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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 663

NEWSPAPER DRIVERS & HANDLERS LOCAL UNION NO. 372, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, IND.,
Petitioner,

v.

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE EVENING NEWS ASSOCIATION, Owner and Publisher of the Detroit News, KNIGHT NEWSPAPERS, INC., Owner and Publisher of the Detroit Free Press,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on June 3, 1965.

CITATIONS TO OPINIONS BELOW.

The Decision and Order of the National Labor Relations Board are reported at 145 NLRB 996 (R. I. 93a-104a)[1] and are printed in Appendix B, *infra*, pp. 21-84, of this peti-

[1] "I" refers to the volume of the printed record in the court below. "93a-104a" refers to the relevant pages of that volume.

tion. The opinion of the court below is printed in Appendix A, *infra*, pp. 13-20 of this petition.

JURISDICTION.

The opinion of the court below was entered on June 3, 1965. Rehearing was denied on July 16, 1965. The final order of the court below, entered on August 3, 1965, appears in Appendix C, *infra*, p. 85. The order denying rehearing appears in Appendix D, *infra*, p. 86. On August 18, 1965, Justice Potter Stewart extended, until October 14, 1965, the time for filing this petition. This order extending time appears in Appendix E, *infra*, p. 87. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS INVOLVED.

1. Whether an employer violates Section 8 (a) (1) or (3) of the Act by locking out its employees prior to any impasse in bargaining?

2. Whether an employer violates Section 8 (a) (1) or (3) when it locks out its employees to bring pressure upon employees of another employer who are on strike, where the two employers bargain separately and not as members of a multi-employer bargaining unit?

3. Whether the employer (i. e., the Free Press) violates Section 8 (a) (1) or (3) by entering into an agreement with another employer (i. e., the News) where, as here, such agreement contemplates that the other employer will illegally lock out its employees and such agreement is thereafter implemented.

STATUTES INVOLVED.

The statutory provisions involved are Sections 7, 8 (a) (1), 8 (a) (3) and Section 13 of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Sec. 151 et seq., referred to as the "Act"). They are printed in Appendix F, *infra*, p. 88.

STATEMENT.

Petitioner, Newspaper Drivers and Handlers Local Union No. 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (referred to as "Local 372") is a labor organization and represents, in separate bargaining units, certain of the employees of two independent firms engaged in the newspaper business in Detroit, Michigan. The two employers, both of whom are joined as Respondents, are The Evening News Association, which publishes a paper called The Detroit News (referred to as the "News") and Knight Newspapers, Inc., which publishes a competing newspaper, The Detroit Free Press (referred to as the "Free Press"). Also joined as a Respondent is the Detroit Newspaper Publishers Association (referred to as the "Association") which handles some labor relations problems for the News and the Free Press, both of whom are members of the Association.[2] Although the National Labor Relations Board (referred to as the "Board") has been designated as a Respondent, it is anticipated that the Board will support, with some limitations, the granting of this petition.

As the court below noted, "the evidence relating to the question presented here is undisputed . . ." (App. B, *infra*, p. 21). The operative facts are these: For more than twenty years Local 372 has negotiated separate collective bargaining agreements with the Free Press and the News (R. I. 71a-72a). These agreements were not identical; on the contrary, some of their provisions dif-

[2] After establishment of the Association in 1945, its executive secretary was usually present at the bargaining sessions between each of the two papers and Local 372, but it appears that he did little more than act as chairman of the meetings. The actual negotiations on behalf of the paper involved were conducted by officials of that paper (R. I. 71a). On a few occasions, officials of the "other" paper appeared, identifying themselves as "observers." When Local 372 protested their appearance in September 1958, the "observers" withdrew, and there was no recurrence (R. I. 71a).

fered markedly. Only employees of the paper involved voted to accept or reject their own employer's offer or to ratify an agreement negotiated by the officers of Local 372 (R. I. 72a). As in past years, separate negotiations were initiated in October, 1961, when Local 372 notified the Free Press and the News of its desire to revise the separate contracts with the Free Press and the News.

Negotiations with the Free Press commenced in October, 1961, and, after numerous negotiating meetings, resulted in an impasse on April 11, 1962 (R. I. 50a-51a; R. V. 995a). The "last best offer" of the Free Press was presented to Local 372 on that day and rejected by the Free Press employees. The Free Press employees also voted to strike, and the strike commenced on April 11, 1962 (R. I. 51a).

Although Local 372 was able to strike the Free Press, its agreement with the News prohibited strike action in connection with negotiations and provided that all unresolved issues between the parties should be submitted to arbitration (Volume V, Resp. Ex. 12, Sec. 3, p. 1069a at pp. 1071a-1072a).

Separate negotiations were conducted between Local 372 and the News. Some thirteen meetings were held from the latter part of October, 1961, and early January, 1962 (R. V. 998a). At a negotiating meeting held on March 22, 1962, Local 372 agreed to submit revised proposals to the News. These proposals were received by the News on April 12, the day *after* the strike at the Free Press had commenced (R. I. 51a).

A meeting was held between officials of the News and the Free Press on April 9 and 10. This meeting was held prior to the News receiving Local 372's revised proposals and prior to the strike by the employees of the Free Press. During the meeting, the News indicated an interest in about ten of the eighteen issues then pending between Local 372 and the Free Press. With respect to

three of these issues which the News considered vital in its bargaining (i. e., change in operations clause, work-week clause and wages), the News urged the Free Press to remain adamant and offered to support the Free Press on these issues. It was agreed between the News and the Free Press that if the employees of the Free Press struck over any of these issues the News "would not publish" (R. I. 50a-51a). The News and Free Press further agreed that "the Union would not be informed that a strike against one is a strike against both or what the position of the News would be in case of a strike at the Free Press" (R. V. 1140a).

Honoring its agreement with the Free Press, the News suspended publication on April 12, the day after the commencement of the strike against the Free Press. Although the News did not publish a newspaper on April 12, 13 or 14, its employees reported to work and were paid for those days. Under date line of Sunday, April 15, the News published an edition captioned, "The Detroit News —The Detroit Free Press. A Temporarily Combined Edition" which was distributed to News and Free Press subscribers by the News distribution employees who were represented by Local 372.[3] When work on this special edition was completed on April 15, the News locked out its employees, advising them that they should not report until further notice and that "there was no work available" (R. I. 51a-52a).

Negotiating meetings between Local 372 and the Free Press were held on April 13 and 14. A separate meeting with the News was held on April 14. Negotiations were recessed until April 18. On April 18 and 19, negotiations resumed and, with the assistance of a mediator, an agree-

[3] Local officers advised News drivers to cross the picket line at the Free Press to pick up some inserts which were part of the combined edition, and also to deliver the combined edition to Free Press as well as News distribution points as instructed (R. I. 52a; II. 274a).

ment was reached between Local 372 and the Free Press. Local 372 was unable to settle its differences with the News, but Local 372 and the News did agree to submit all unresolved issues to arbitration. On April 19, Local 372 terminated its strike against the Free Press and the News ended its lockout.

Based upon unfair labor practice charges filed by Local 372, and similar charges filed by other labor organizations, an unfair labor practice complaint alleging violations of Sections 8 (a) (1) and (3) of the Act was issued against the News, the Free Press and the Association. The Board, affirming the Trial Examiner, held that the lockout by the News from April 16 to April 19 was used as an "offensive weapon" and violated the Act (R. I. 97a, 99a-100a). In reaching this conclusion, the Board specifically noted that the employers "concededly did not bargain with [Local 372] in a joint or multiemployer unit as that term has traditionally been employed by the Board and the Courts" (R. I. 100a). Although the News' lockout, which the Board found to be unlawful, was undertaken pursuant to an express agreement between the News, the Free Press and the Association, the Board rejected the Trial Examiner's recommendation that all three be held liable for the lockout.

Following the entry of the Board's order, the News, Free Press and Association petitioned the court below to set aside the Board's order. The Board requested enforcement. Local 372 also petitioned the court below to impose, as did the Trial Examiner, joint and several liability upon the News, the Free Press and the Association. The Board's request for enforcement of its order against the News was supported by Local 372. The various petitions were consolidated in the court below.[4]

[4] While the standing of the Free Press and the Association to initially petition the court below is doubtful, their interest was established when Local 372 filed its petition. We are here concerned with a unitary proceeding in which all parties fully partici-

Relying primarily upon *American Ship Building Co. v. Labor Board,* 380 U. S. 300, the court below denied enforcement of the Board's order. In the course of its opinion, the court below said (App. A, *infra,* pp. 17 and 18):

> "While in *American Ship Building* there was an impasse in the negotiations between the employer and the union, we do not think the teaching of that case merely adds another exception to the Board's category of permissible lockouts.
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> • • • • • • • •
>
> "It is likewise true in the case before us 'that there is no allegation that the employer used the lockout in the service of designs inimical to the process of collective bargaining.'"

Three days after the court below published its decision in the instant case, this Court announced its decision in *United Mine Workers v. Pennington,* 381 U. S. 657. Because of the obvious implications of the *Pennington* holding for a case such as the present one and because of the intervening decision in *American Ship Building,* rehearing was requested for the purpose of remanding the case to the Board for re-examination in light of those decisions. The petition was denied without opinion. Local 372 seeks review.

REASONS FOR GRANTING THE WRIT.

The critical facts are undisputed and they are these: Local 372 bargains separately with the News and the Free Press. The News locked out its employees prior to any impasse in bargaining between Local 372 and the News. The lockout by the News was implemented pursuant to an agreement with the Free Press and was for the purpose of supporting the Free Press in its separate

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pated at all stages. Accordingly, the interest and standing of the Petitioner and each of the Respondents is not in doubt. *International Union v. Eagle-Picher Mining & Smeltering Co.,* 325 U. S. 335, 338-339.

negotiations with Local 372. Given these facts, it is clear that the court below not only misconstrued and misapplied *American Ship Building*, but in addition ignored *Pennington*.

The court below reads *American Ship Building* as conferring *carte blanche* authority for the use of lockouts in the absence of a demonstrated unlawful intent. But such a view ignores both the facts and the express holding of *American Ship Building*. Carefully defining its holding, this Court said (380 U. S. at 308):

> "What we are here concerned with is the use of a temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached. That is the only issue before us, and all that we decide."

Since no impasse in bargaining was reached between Local 372 and the News, and because the lockout was not in support of the News' bargaining position, it is clear that *American Ship Building* in no way supports the decision below.

Moreover, it is significant that the Tenth Circuit—whose decision denying enforcement of the Board's lockout order in *Labor Board v. Brown*, 380 U. S. 278, was upheld by this Court—concluded subsequent to its *Brown* decision that an employer who engaged in a lockout *prior to an impasse* in bargaining violated the Act. *Labor Board v. American Stores Packing Co.*, Cause No. 7702 (10th Cir., March 15, 1965).[5] However, by a divided vote,

[5] The text of the withdrawn opinion in *American Stores, supra*, is printed in Labor Relations Reference Manual, published by the Bureau of National Affairs, Volume 58, pp. 2635-2639. The text of the decision remanding the case for reconsideration by the Board may be found at Volume 60, Labor Relations Reference Manual, p. 2128. The text of the order in *Simplot Co. v. Labor Board, infra*, is printed in Volume 60, Labor Relations Reference Manual, p. 2096.

it withdrew this opinion when it granted the employer's request for rehearing in light of this Court's decision in *American Ship Building* and remanded the case to the Board. Chief Judge Murrah, dissenting from the order of remand, would have enforced the Board's order and denied rehearing, since in *American Stores*, as in the case at bar, the lockout did not follow on the heels of an impasse in bargaining. See also *Simplot Co. v. Labor Board*, Cause No. 19038 (9th Cir., June 29, 1965), granting the Board's request, which the employer opposed, to remand the case to the Board. In *Simplot* the Board held a lockout unlawful, *inter alia*, because it was part of a series of other acts which the Board held to be independently unlawful. The court remanded the case to the Board "with directions to reconsider its holding herein in the light of the Supreme Court's decision in *American Ship Building v. Labor Board*," a course of action which should have been followed in this case.

Additionally, when *American Ship Building* is read in light of *Pennington*, it can be seen—and the Court below should have recognized—that Congress has not conferred upon employers the right to lockout at will. This Court in *American Ship Building*, thought it "important to note that there [was] no allegation that the employer used the lockout in the service of designs inimical to the process of collective bargaining", 380 U. S. at 308. Similarly, in *American Ship Building*, this Court stressed the fact that the employer used the lockout "solely in support of a legitimate bargaining position. . . ." 380 U. S., at 310. Here the lockout by the News clearly served "designs inimical to the process of collective bargaining" and it is equally clear that the lockout by the News was not "solely in support of a legitimate bargaining position. . . ."

Pennington teaches that it is contrary to the national labor policy for an employer group and a union to enter into agreements designed to determine the wages and

working conditions of employees in separate bargaining units. Here the agreement between the News and the Free Press provided that the News would lock out its employees to determine the wages and working conditions of employees of the Free Press. Thus, the lockout by the News, initiated prior to an impasse in bargaining between the News and Local 372 and undertaken in support of an employer in another unit, falls squarely within the rule of the *Pennington* case. As such, it was neither compatible with the "process of collective bargaining" nor was it "solely in support of a legitimate bargaining position . . ."; and both are expressly required under *American Ship Building.*[6]

Further considerations support the granting of this petition. "Section 7 grants employees, *inter alia,* 'the right to form, join or assist labor organizations.' Defeat of those rights by employer action does not necessarily depend on the existence of an anti-union bias." *Labor Board v. Burnup & Sims,* 379 U. S. 20, 22-23. See also: *Labor Board v. Katz,* 369 U. S. 736, 743 n. 11. We are here concerned with the legality of a lockout. *Labor Board v. Truck Drivers Union* (*Buffalo Linen*), 353 U. S. 87, 96, specifically holds that in such cases "the ultimate problem is the balancing of conflicting legitimate interests." *American Ship Building* cannot be viewed as a departure from this principle; for this Court in *Labor Board v. Brown,* 380 U. S. 278, a companion case to *American Ship*

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[6] Since the liability of the Free Press and the Association is wholly dependent upon the legality of the lockout by the News, we have not separately briefed this issue. It should be noted, however, that the undisputed evidence before the Board shows that the lockout agreement entered into by the News, the Free Press and the Association was fully implemented when the Free Press gave Local 372 its last best offer on April 12. That proposal did not include any concession on the three issues which were covered by the lockout agreement (See: R. V. 971a-973a). If, as Local 372 contends, the News lockout was unlawful, the Free Press and the Association obviously should bear responsibility for their part in the illegal scheme. See e. g.: 15 C. J. S., *Conspiracy,* Sec. 18, pg. 1028.

Building, expressly reaffirmed its holding in *Buffalo Linen*, 380 U. S. at 285.

The lockout here not only occurred in the absence of an impasse and in the face of binding contractual commitment on the union not to strike, but it also extended industrial strife beyond the confines of the primary dispute. For by locking its employees out to aid the Free Press, the News enmeshed both itself and its employees in the dispute between the Free Press and Local 372 in an effort to influence the outcome of that dispute. It did not do so, as the employers in *Brown* and *Buffalo Linen*, to preserve the integrity of a multi-employer bargaining unit for it had no multi-employer unit to preserve. Its employees, it should be noted, could not have struck the News to influence the dispute between the Free Press and Local 372. Cf. *Miami Newspaper Printing Pressmen's Local 46 v. Labor Board*, 322 F. 2d 405 (D. C. Cir., 1963).[7]

The decision below thus confers upon employers the right to spread industrial strife beyond the confines of a primary dispute whenever they deem it in their bargaining interests to do so. To confer upon employers such a power when this power is specifically denied to unions is to upset the balance Congress struck "between the uncontrolled power of management and labor to further their respective interests" (*Local 1976, Carpenters v. Labor Board*, 357 U. S. 93, 100) by placing limits upon the conduct employers and unions may engage in to strengthen their own, and weaken the others', bargaining position.

[7] The *Local 46* case held that it was illegal to picket the Free Press in Detroit, Michigan in support of a dispute with the Miami Herald even though both papers are owned by three members of the Knight family and have directors in common. The Court concluded that the central legislative purpose of Section 8(b)(4) is "to confine labor conflicts to the employer in whose labor relations the conflict had arisen, and to wall off the pressures generated by that conflict from unallied employers." *Miami Pressmen's Local v. Labor Board*, 322 F. 2d at 410.

This balance was not taken into account by the court below and perhaps more importantly has not yet been drawn by the Board. Neither *American Ship Building* nor *Pennington* were available to the Board at the time it rendered its decision in this case. Both bear importantly on the balancing function which the Congress has committed primarily to the Board. Given these circumstances, the court below patently erred in denying the Board's motion to remand this case for reconsideration in light of *American Ship Building*.

The possible consequences of the decision below are far reaching. Under this decision, a large automobile manufacturer, for example, could during its negotiations but before impasse lockout its employees for the sole purpose of bringing economic pressure upon the employees working for a different automobile manufacturer who are engaged in a strike, even though the negotiations are conducted separately in separate bargaining units for different agreements. Such an action, and the agreement to take such action, are clearly coercive and, as a matter of law, interfere with and restrain employees in the exercise of their rights protected by Section 7 of the Act and discriminate against employees who have exercised these rights, in violation of Section 8 (a) (3) of the Act. This court should not permit the decision of the court below to stand as the law on these matters.

CONCLUSION.

For the reasons stated, this petition should be granted.

Respectfully submitted,

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APPENDIX "A".

Opinion of the Court.

(Caption Omitted.)

Cecil, Circuit Judge. This cause is before the Court upon the petition of Detroit Newspaper Publishers Association, The Evening News Association, owner and publisher of the Detroit News, and Knight Newspapers, Inc., owner and publisher of the Detroit Free Press, to review and set aside an order of the National Labor Relations Board, hereinafter called the Board, issued on January 15, 1964. 145 NLRB 996. The Board seeks enforcement of the order. Detroit Newspaper Publishers Association, Evening News Association and Knight Newspapers, Inc. will be referred to herein as the Association, the News and the Free Press, respectively.

The Board found the News, only, guilty of an unfair labor practice in violation of Section 8 (a) (1) and (3)[1] of the National Labor Relations Act, hereinafter called the Act (Section 158 (a) (1) and (3), Title 29, U. S. C.), by laying off or "locking out" certain of its employees, from April 16 to 19, 1962. The usual order followed. The News was directed to cease and desist from discouraging membership in certain unions or any other labor organization "by locking out any of its employees in order to support another employer which is struck by employees represented in a labor organization with which it does not bargain jointly in a multiemployer unit," and "(i)n any like or related manner interfering with, restraining, or coercing

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[1] 29 U. S. C., Sec. 158, "Unfair Labor Practices".

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title:

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ."

its employees in the exercise of the right to self organization," etc. It was also directed to make whole its employees for lost time and post the usual notice.

The evidence relating to the question presented here is undisputed and may be stated as follows: The Association is a voluntary unincorporated association whose membership consists solely of the News and the Free Press. It was formed many years ago by the Detroit papers for the purpose of negotiating and administering labor contracts and handling the labor relations of its members. The News and the Free Press are the only large daily newspapers in Detroit. The News publishes in the afternoon of week days and on Sunday morning. The Free Press publishes daily in the morning, including Sunday.

In October, 1961, Newspaper Drivers & Handlers' Local Union No. 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., hereinafter called the Teamsters, and the petitioner in case No. 15743 herein, gave notice to the Free Press of its desire to revise its contract with the Free Press expiring November 15, 1961. The Free Press and the Teamsters held seventeen bargaining sessions between October 26, 1961, and March 20, 1962. On April 6th, the Teamsters presented a revised proposal to the Free Press and advised that strike action would be recommended on April 11th, if a satisfactory offer was not received by that date. About noon of April 11th, the Free Press gave the Teamsters its "last best offer" which was presented to and rejected by the Teamster members in the Free Press unit. The members voted to strike, a picket line was set up that afternoon, and the Free Press suspended publication.

In October, 1961, the Teamsters also gave notice to the News of its desire for a revision of its contract with that newspaper. Between October 27, 1961, and January 11, 1962, the Teamsters and the News held thirteen bargaining

meetings. The parties met again on March 22nd and the Teamsters agreed to submit revised contract proposals. Revised proposals were not submitted to the News until April 12th, the day following the commencement of the strike at the Free Press.

On April 9th and 10th officials of the News met with officials of the Free Press to discuss what were common problems with the Teamsters. It was found that of about eighteen issues between the Free Press and the Teamsters, ten of them were of interest to the News. The News urged the Free Press not to give in on three of them under any circumstances. The News agreed that if the Teamsters struck the Free Press over its refusal to accede to any of those three demands, it would support the Free Press and would not publish. The two papers further agreed that they would not inform the Union that a strike against one would be a strike against both, or what the position of the News would be in event of a strike at the Free Press.

It is conceded that the Free Press and the News do not bargain with the Teamsters jointly or as a multi-employer unit, as that term is traditionally used by the Board and the courts. The News ceased publication when the Teamsters struck the Free Press. It did not publish any papers under date line of April 12th, 13th or 14th. The employees reported for work on those days and were paid. On Sunday, April 15th, the News published a "double-mast head" edition called *The Detroit News-The Detroit Free Press*. "A Temporarily Combined Edition." Following this the News notified its employees not to report for work until further notice. The employees were out through April 19th.

On April 13th, James Hoffa, President of Teamsters International, asked Robert Butz, Secretary of the Association, to arrange a meeting on the Free Press contract.

He also told Butz "that the News had better be present or on a stand-by basis at the meeting because the issues at the News would have to be settled or they'd be on strike also." Hoffa and the Teamster officials met with the Free Press on the afternoon of April 13th and the morning of the 14th. They met with the News on the afternoon of April 14th.

Subsequently, through the efforts of George Edwards, then Police Commissioner of Detroit, now a Judge of this Court, acting as mediator, the Free Press and the Teamsters reached an agreement. The News and the Teamsters agreed that issues not solved between them would be submitted to arbitration. The Teamsters ended its strike on April 19th and the News ended its lockout.

The Board's decision is to the effect that a lockout,[2] except in the case of multiemployer bargaining units or for the purpose of avoiding economic loss, is prima facie a violation of Sections 8(a)(1) and 8(a)(3) of the Act. On March 29, 1965, the Supreme Court handed down its opinion in *The American Ship Building Company v. National Labor Relations Board*, 380 U. S. 300. The opinion in this case is relevant to the case now before us. Counsel for the Board request us to remand the within case to the Board for further consideration in the light of *The American Ship Building* case.

The Board had all the evidence before it concerning the layoff of the employees of the News, including the background of the newspaper situation in Detroit, the past records of the News and Free Press in dealing with unions, the findings of fact of the trial examiner and the arguments of counsel on the question at issue. The view now taken by the Supreme Court was argued to the Board and

[2] A layoff of employees in connection with collective bargaining negotiations is commonly referred to as a "lockout."

it chose not to follow it but to bottom its decision on its conclusion that any lockout, other than for the exceptions above mentioned, was illegal. This was consistent with the Board's former decisions. Neither side requested a remand and we see no reason why one should be made now. Furthermore, we are of the opinion that under the undisputed facts in this case a violation of Sections 8(a)(1) and 8(a)(3) could not be supported. The motion to remand is therefore denied.

While in *American Ship Building* there was an impasse in the negotiations between the employer and the union, we do not think the teaching of that case merely adds another exception to the Board's category of permissible lockouts.

As was said in that case, to establish a violation of Section 8(a)(1),

> "It must be shown that the employer has interfered with, restrained, or coerced employees in the exercise of some right protected by Section 7 of the Act. The Board's position is premised on the view that the lockout interferes with two of the rights guaranteed by Section 7: the right to bargain collectively and the right to strike. In the Board's view, the use of the lockout 'punishes' employees for the presentation of and adherence to demands made by their bargaining representatives and so coerces them in the exercise of their right to bargain collectively. It is important to note that there is here no allegation that the employer used the lockout in the service of designs inimical to the process of collective bargaining. There was no evidence and no finding that the employer was hostile to his employees banding together for collective bargaining or that the lockout was designed to discipline them for doing so." 380 U. S. at 308

It is likewise true in the case before us "that there is no allegation that the employer used the lockout in the service of designs inimical to the process of collective bargaining" (Supra). There is no finding that the News was hostile to the Teamsters, or that it in any way attempted to interfere with the Teamsters' right to collective bargaining, or that the layoff was designed to discipline the employees for adhering to its union demands. Nor would the facts support such a finding. The News as well as the Free Press had a long record of dealing with the Teamsters. There was no disposition manifested to refuse to bargain with the Teamsters or to discourage membership in its union. Nor was there any animus shown toward the organization of the Teamsters or any of its members. The only question between the News and the Teamsters concerned the terms of the collective bargaining agreement.

With reference to a violation of Section 8(a)(3) the Court said:

> "To find a violation of Section 8(a)(3) then, the Board must find that the employer acted for a proscribed purpose. Indeed, the Board itself has always recognized that certain 'operative' or 'economic' purposes would justify a lockout. But the Board has erred in ruling that only these purposes will remove a lockout from the ambit of Section 8(a)(3), for that section requires an intention to discourage union membership or otherwise discriminate against the union. There was not the slightest evidence and there was no finding, that the employer was actuated by a desire to discourage membership in the union as distinguished from a desire to affect the outcome of the particular negotiations in which he was involved." 380 U. S. at 313.

What the Court said about the lack of evidence and findings is equally true in the case at bar. The Court concluded "that where the intention proven is merely to bring about a settlement of a labor dispute on favorable terms, no violation of Section 8(a)(3) is shown." 380 U. S. at 313.

In Labor Board v. Brown, 380 U. S. 278, the Court said:

> "We begin with the proposition that the Act does not constitute the Board as an 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.' Labor Board v. Insurance Agents, 361 U. S. 477, 497. In the absence of proof of unlawful motivation, there are many economic weapons which an employer may use that either interfere in some measure with concerted employee activities, or which are in some degree discriminatory and discourage union membership, and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either Sections 8(a)(1) or (3)." 380 U. S. at 283.

And further, at p. 286, "Under that section (8(a)(3)) both discrimination and a resulting discouragement of union membership are necessary but the added element of unlawful intent is also required."

In *N. L. R. B. v. Truck Drivers Union*, 353 U. S. 87 (*Buffalo Linen*) the Court said, at p. 92:

> "Although, as the Court of Appeals correctly noted, there is no express provision in the law either prohibiting or authorizing the lockout, the Act does not make the lockout unlawful *per se*. Legislative history of the Wagner Act, 49 Stat. 449, indicates that there was no intent to prohibit strikes or lockouts as such."

We conclude that the Board was in error in finding that the lockout of employees by the News was prima facie a violation of Sections 8(a)(1) and 8(a)(3). We further conclude that the violations of Sections 8(a)(1) and 8(a)(3), as found by the Board, are not supported by a consideration of the record as a whole. The order of the Board is therefore vacated and enforcement denied.

In appeal No. 15743, the Teamsters, as petitioner, challenge the Board's findings: 1. that the suspension of publication by the News from April 12 to April 14, 1962, did not constitute a threat to lock out employees in violation of Sections 8(a)(1) and 8(a)(3) of the Act; and 2. that the Free Press and the Association did not violate Sections 8(a)(1) and 8(a)(3) of the Act by implementing their agreement with the News. The petitioner concedes that its position can only be sustained in the event that the Court holds that the lockout by the News was a violation of the Act. Since we hold that this lockout was not in violation of the Act, the petition of the Teamsters is dismissed.

APPENDIX "B."

Decision of the National Labor Relations Board.

(Caption omitted.)

Decision and Order.

On June 6, 1963, Trial Examiner Harold X. Summers issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. The Trial Examiner also found that the Respondents had not engaged in certain other unfair labor practices, and recommended that the allegations of the complaint pertaining thereto be dismissed. Exceptions to the Intermediate Report and supporting briefs were filed by the Respondents and the General Counsel; exceptions only were filed jointly by Local 12, Detroit Photo-Engravers' Union, International Photo-Engravers' Union of North America, AFL-CIO; Detroit Stereotypers' Union No. 9, International Stereotypers' and Electrotypers' Union of North America, AFL-CIO; Newspaper Guild of Detroit, American Newspaper Guild, AFL-CIO; and, Local No. 58, International Brotherhood of Electrical Workers, AFL-CIO, four of the Charging Parties herein. Exceptions with supporting memorandum of authorities were filed by Newspaper Drivers and Handlers Local Union 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., another of the Charging Parties herein.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated

its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner to the extent they are consistent with this decision.

The essential facts herein are not in dispute and are fully set forth in the Intermediate Report. Briefly, they show that the Respondents are the Detroit Newspaper Publishers Association and its two members, i. e., the Evening News Association, owner and publisher of The Detroit News, and Knight Newspapers, Inc., owner and publisher of The Detroit Free Press.[2] The publishers, with the Association as their agent, have bargained historically in multi-employer units with the Pressmen, Stereotypers, Mailers, ITU, IBEW, Engineers, Machinists, Mechanics, and Local 10, Detroit Paper and Plate Handlers' Union, International Printing Pressmen and Assistants' Union of North America, AFL-CIO, herein called

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[1] The Respondents and the General Counsel have excepted to certain credibility findings. As it is the Board's established policy not to overrule a Trial Examiner's resolutions with respect to credibility unless, as is not the case here, the clear preponderance of all the relevant evidence convinces us that the resolutions were incorrect, we find insufficient basis for disturbing the Trial Examiner's credibility findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 198 F. 2d 362 (C. A. 3).

[2] The Respondents are hereafter also called the Association, the News, and the Free Press, respectively. The News and the Free Press are also collectively called the publishers.

PPH.[3] The publishers traditionally have bargained with the Teamsters in individual units.

1. The events in issue occurred in 1962. On February 14, the News was unable to publish because of a work stoppage by its paper and plate handlers, represented by PPH; the Free Press thereupon suspended publication of its February 15 edition but did not lock out its employees. On April 11 through 19, the Teamsters picketed the Free Press; on April 12, 13 and 14 the News suspended publication, without locking out its employees, and on April 16 through 19 locked out its employees. Finally, from May 7 through 9 the paper and plate handlers struck at the News, and on May 8 and 9 the Free Press locked out its employees.

By way of background, the record reveals that between 1955 and November 1961, i. e., prior to the above incidents and prior to the 10 (b) period,[4] each of the Respondent publishers consistently suspended publication and/or locked out its employees whenever the other publisher was confronted with a work stoppage by employees represented by a labor organization with which the Respondents bargained in a multiemployer unit. However, there was

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[3] In connection with its notice of intention to open negotiations for its 1961-63 contract, PPH made timely request for separate bargaining with the News and the Free Press. The publishers rejected the request, insisting on continuing their joint bargaining. Thereafter, PPH bargained jointly with the two publishers and on February 15, 1962, signed a joint agreement to arbitrate the terms of the new contract. We find that the Trial Examiner correctly rejected the General Counsel's contention that as a result of the request for separate bargaining the multiemployer unit ceased to exist.

[4] Respondents excepted to the Trial Examiner's admission of evidence predating the 10 (b) period. We find that the Trial Examiner properly accepted and considered this as background evidence to shed light on events occurring within the 10 (b) period. Cf. *Southern Electronics Company, Inc.*, 131 NLRB 1411; *Bryan Manufacturing Company*, 362 U. S. 411.

no evidence, during this period, of similar supportive suspensions or lockouts in any dispute with a labor organization with which Respondents bargained in single employer units.

On the basis of the above conduct, as well as evidence in the record of statements by Respondents' agents and stories published in their newspapers concerning the suspensions and lockouts, the Trial Examiner found that the Respondents were parties to an unwritten but well-known suspension agreement to the effect that if either publisher suffered a work stoppage, the other would suspend its own publishing operations. He specifically found that this agreement was not confined to the multiemployer bargaining units in which the Respondents negotiated but was intended to apply to all unions with which both publishers bargained, whether in multiemployer or single-employer units. The Trial Examiner concluded that because of its breadth (i. e., its coverage of single-employer bargaining units), the suspension agreement was violative of Section 8 (a) (1), and that since the existence of the pact was made known to the employees, it tended to inhibit them in the exercise of their Section 7 rights. We do not agree with all of the Trial Examiner's findings and conclusions concerning the nature of the suspension pact.

It is clear that, except for the April lockout by the News while the Teamsters picketed the Free Press, all the incidents noted by the Trial Examiner involved lockouts which occurred automatically where one publisher was picketed by a labor organization with which the Respondents bargained in a multiemployer unit. The April suspension and lockout by the News, however, was not undertaken in the same fashion. Rather, it resulted from discussions between representatives of the two publishers on April 9 and 10 concerning their com-

mon problems in connection with their then current negotiations with the Teamsters.[5] As set forth in the Intermediate Report,[6] the Respondents found that of the 18 issues remaining unresolved between the Teamsters and the Free Press, 10 were also of interest to the News in its negotiations with the Teamsters. Of these 10 issues, the News considered 3 as being vital in its bargaining and urged the Free Press to maintain its position on these under all circumstances. The News agreed that if the Free Press were struck because of its refusal to concede on any of these three demands, the News would support the Free Press and would not publish. It was further agreed that this understanding would not be communicated to the Teamsters, and there is no evidence that there was any breach of this aspect of their agreement.

On the basis of all the facts, we find that the Respondents were parties to two suspension agreements. One agreement was not intended as an offensive weapon but was for the purpose of protecting the integrity of the multiemployer bargaining units. It had existed for many years, and was well known to the employees and their bargaining representatives. The other, reached in April, 1962, was restricted to the current negotiations with the Teamsters, and was not made public. Contrary to the Trial Examiner, we find no basis for concluding that the long-standing agreement was intended to encompass bargaining in single-employer units, particularly since the only showing of supportive action in a single-employer unit was concededly preceded by the specific understanding noted above. If the long-standing agreement

[5] Throughout their separate negotiations, the publishers met with each other to discuss their common problems and issues with the Teamsters' demands.

[6] See item 14 of the Trial Examiner's chronology of events.

had contemplated suspension or lockout action against employees represented in single-employer bargaining units, there would have been no purpose in the publishers' discussions of April 9 and 10 or the resulting agreement relating to 3 out of 18 unresolved issues. We further find, on this record, that the long-standing pact was an agreement to take action which has been held lawful in the *Buffalo Linen* case,[7] and, as found below, there is no evidence of any acts by the Respondents pursuant thereto within the 10 (b) period which would lead to a different conclusion. Accordingly, we find no unfair labor practice in the existence or publication of the long-standing agreement in the multiemployer units.

However, we have held, for substantially the reasons set forth by the Trial Examiner herein, that an agreement to engage in supportive lockout action by employees who do not bargain jointly in a multiemployer unit contemplates conduct which exceeds the permissible defensive limits under *Buffalo Linen*.[8] Since the Respondents herein have bargained with the Teamsters in separate units, the News, in April 1962, undertook to engage in an unlawful act. However, in order to constitute a violation of Section 8 (a) (1) of the Act, it must be established that this conduct tended to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7,[9] and that could be shown here only if, as the General Counsel contends, the agreement amounted to a threat to lock out the employees. This,

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[7] *Buffalo Linen Supply Co.*, 353 U. S. 917. Cf. *Publishers Association of New York City*, 139 NLRB 1092, 1096-1097.

[8] *Buffalo Linen Supply Co., supra; The Great Atlantic and Pacific Tea Company*, 145 NLRB No. 39.

[9] Cf., *Southern Cotton Oil Crude Mill*, 144 NLRB No. 92; *The Great Atlantic & Pacific Tea Company*, 123 NLRB 747, 752-753; *Jackson Tile Manufacturing Company*, 122 NLRB 764, 765, 786.

in turn, depends on whether the employees or their representatives were informed or knew of the existence of the agreement. As noted above, the record here contains no evidence that the April 10 agreement was communicated,[10] and the evidence of the Respondents' past conduct shows no prior lockouts under similar circumstances from which employee knowledge could be inferred. Accordingly, we are unable to conclude that the mere entering into the agreement, without more, violated the Act.

In view of the above, we do not adopt the Trial Examiner's finding that the Respondents violated Section 8 (a) (1) by virtue of the existence of their suspension agreements and shall dismiss the complaint insofar as it alleges such a violation.

2. The Trial Examiner concluded that all of the 1962 suspensions and lockouts occurred pursuant to the single agreement which he found to exist, but that only the lockout by the News from April 16 to 19, inclusive, was violative of Section 8 (a) (3) and (1) of the Act. We agree with the Trial Examiner that the acts of February 15,[11] when the Free Press did not publish, and May 8 and 9, when the Free Press locked out its employees, did not constitute violations of the Act. We also agree with the Trial Examiner that no violation occurred by reason of the suspension of publication by Respondent News on April 12, 13, and 14, but we so find because we conclude, on the facts, that there was no lockout of the employees

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[10] The Trial Examiner's finding of communication was based solely on the employees' awareness of the older pact.

[11] In connection with the suspension of publication by the Free Press on February 15, we rely only on the fact that it acted to preserve the multiemployer bargaining unit, in accordance with the *Buffalo Linen* principle. We do not adopt the Trial Examiner's rationale that no violation occurred because there was no loss of employment. While the question of actual loss of employment and wages is relevant in our determination of the appropriate remedy if an unfair labor practice has been found, it is not determinative of whether or not an unfair labor practice has been committed.

and no showing that a lockout was threatened. Rather, the evidence indicates that all employees of the News worked and were fully paid, and, as previously noted, there is no evidence that the employees were aware that the News had agreed to close down if a strike occurred at the Free Press.

We further agree, for the reasons given by the Trial Examiner, that the lockout by the News on April 16 through 19 violated Section 8 (a) (1) and (3) of the Act. The Respondents concededly did not bargain with the Teamsters in a joint or multiemployer unit as that term has traditionally been employed by the Board and the Courts. The *Buffalo Linen* doctrine, under certain circumstances, permits a defensive lockout by a nonstruck employer for the purpose of preserving the integrity of the multiemployer bargaining unit. However, where as in the instant case, such an established unit does not exist, *Buffalo Linen* does not apply.[12]

Since the News' lockout of its Teamsters unit employees on April 16 to 19, inclusive, has been held to have violated Section 8 (a) (1) and (3), we further find that the incidental layoffs of other employees during this period also violated Section 8 (a) (1) and (3) of the Act.[13] Although

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[12] *The Great Atlantic and Pacific Tea Company, supra,* footnote 8.

Respondents conceded in their brief that their bargaining relationship with the Teamsters was not joint in the traditional sense of that term. They urged, however, that in view of the particular circumstances here involved, the Board should apply the principles of *Buffalo Linen* to the facts of this case because (1) the two publishers are the sole publishers of daily newspapers in the Detroit area, competing with each other for readers, advertisers, and employees, and (2) the bargaining issues created by the Teamsters contract demands at both the News and the Free Press were, to a significant degree, identical. We find that the Trial Examiner was correct in rejecting this contention.

[13] *The Great Atlantic and Pacific Tea Company, supra,* footnote 8.

the lockout was not directed against these other employees, their loss of employment was proximately and entirely due to the unlawful lockout of the Teamsters unit employees.

Unlike the Trial Examiner, however, we find that Respondent News alone engaged in unlawful conduct by virtue of its lockout action. In the absence of proof that the Free Press or the Association in any manner implemented the agreement, or engaged in any unlawful conduct pursuant to said agreement, we cannot, on the facts of this case, charge them with liability for the unlawful conduct of the News.

3. We agree with the Trial Examiner that the preparation, publication and distribution by Respondent News of a double masthead newspaper, entitled *The Detroit News-The Detroit Free Press,* "A Temporarily Combined Edition," datelined April 15, did not violate Section 8 (a) (1). However, we so find because of the absence of proof of unlawful motive or union animus.[14] To find, as the General Counsel would have us do, that the issuance of the double masthead constituted either a threat of lockout or an attempt to provoke a strike at the News would require that we infer such unlawful motivation from the events themselves. While this might be appropriate where the inference is inherent in the conduct itself, that is not the case here.

4. Having found that Respondent News alone violated Section 8 (a) (1) and (3) by locking out certain of its employees from April 16 to 19, inclusive, we shall order that Respondent News make whole these employees for the loss of earnings suffered by them because of the dis-

[14] The Trial Examiner found that Respondents presented a valid economic reason for issuing the double masthead edition, because April 15 was one week before Easter. Although we agree with the Trial Examiner's conclusion that no violation occurred, we do not rely on the economic reason.

crimination against them by paying to each of them a sum of money equal to the amount he would have earned but for the unlawful lockout, less his net earnings during the period of such lockout. Backpay shall include interest at the rate of 6 percent per annum. We shall also modify the Recommended Order by limiting the remedy to the violations found herein.

Order.

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, the Evening News Association, owner and publisher of The Detroit News, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Newspaper Drivers & Handlers' Local Union No. 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Inc., or any other labor organization, by locking out any of its employees in order to support another employer which is struck by employees represented in a labor organization with which it does not bargain jointly in a multiemployer unit.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as amended.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole all its employees who were locked out from April 16, 1962, to April 19, 1962, inclusive, for any loss of pay they may have suffered by reason of the discrimination against them, by paying to each of them a sum of money equal to the amount he would have earned but for the said loss of employment, less his net earnings during the period of such loss. Backpay shall include interest at the rate of 6 percent per annum computed quarterly.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its plant in Detroit, Michigan, copies of the notice attached hereto marked "Appendix."[15] Copies of such notice, to be furnished by the Regional Director for the Seventh Region, shall, after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notice is not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Seventh Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[15] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

It is further ordered that the complaint be dismissed entirely as to Respondents Knight Newspapers, Inc., and Detroit Newspaper Publishers Association and that it be dismissed insofar as it alleges other conduct by Respondent Evening News Association to be violative of the National Labor Relations Act.

Dated, Washington, D. C., Jan. 15, 1964.

/s/ Boyd Leedom,
Boyd Leedom, Member

/s/ John H. Fanning,
John H. Fanning, Member

/s/ Gerald A. Brown,
Gerald A. Brown, Member

(Seal) National Labor Relations Board.

INTERMEDIATE REPORT.

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Statement of the Case.

Upon unfair labor practice charges filed by various parties—see "The Unions," *infra*—against Detroit Newspaper Publishers Association, Knight Newspapers, Inc., and the Evening News Association, the General Counsel of the National Labor Relations Board issued an amended consolidated complaint on June 29, 1962, alleging that Respondents had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, herein called the Act. Respondents' answers admitted some allegations of the complaint, denied or disclaimed knowledge of others, and, in substance, denied the commission of any unfair labor practices. Pursuant to notice, a hearing was held before the undersigned Trial Examiner, Harold X. Summers, at Detroit, Michigan, on September 17-20, September 25-27, and October 29-November 2, 1962.[1] All parties were afforded full opportunity to examine and cross-examine witnesses, to argue orally, and to submit briefs. Briefs have been filed by the General Counsel, by one of the Charging Parties, and (jointly)

[1] The hearing was closed by my telegraphic order of November 6, 1962, which order is hereby received in evidence as Trial Examiner's Exhibit 1.

by the Respondent, which briefs have been fully considered.

Upon the entire record of the case, including my evaluation of the witnesses based upon the evidence and my observation of their demeanor, I make the following:

Findings of Fact.

I. The Employers.

Knight Newspapers, Inc., hereinafter called the Free Press, an Ohio corporation, and the Evening News Association, hereinafter called the News, a Michigan corporation, own and publish the Detroit *Free Press* and the Detroit *Evening News*[2] *respectively.*[3] During the calendar year 1961, in the course and conduct of their newspaper operations, the Free Press and the News each were members of, and subscribed to, various interstate news services, among them the United Press International and the Associated Press; published various syndicated features; advertised various nationally sold products; caused newsprint, inks, and other goods and materials valued at in excess of $500,000 to be transported directly from States other than the State of Michigan to its plant at Detroit, Michigan; published newspapers and caused substantial numbers of them to be delivered directly to points outside the State of Michigan; and derived gross revenues from its printing and publishing operations in excess of $2,000,000.

I find that the Free Press and the News are employers engaged in commerce within the meaning of the Act.

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[2] When used herein, the names of the newspapers, as opposed to the names of the Respondents, will be italicized.

[3] The Free Press also owns and operates an office building with tenants other than itself; the News also owns and operates a radio and television station.

The Detroit Newspaper Publishers Association, hereinafter called the Association, is a voluntary unincorporated association whose membership consists of the Free Press and the News. The Association consults with and advises its members on matters of labor relations and other fields of common interest and, on behalf of its members, negotiates contracts with and assists in the adjustment of grievances filed by labor organizations who represent employees of its members. It is a nonprofit organization whose expenditures are shared equally by its members.

I find that the Association is an agent of the Free Press and the News.[4]

II. The Unions.

The Respondents deal, with respect to certain of their employees, with one or another of fourteen (14) organizations.

Among these are the Charging Parties herein: Local 10, Detroit Paper & Plate Handlers Union, International Printing Pressmen and Assistants' Union of North America, AFL-CIO, herein called PPH; Detroit Newspaper Printing Pressmen's Union No. 13, International Printing Pressmen and Assistants' Union of North America, AFL-CIO, herein called Pressmen; Local 12, Detroit Photo-Engravers' Union, International Photo-Engravers' Union of North America, AFL-CIO, herein called Photo-Engravers; Detroit Stereotypers' Union No. 9, International Stereotypers' and Electrotypers' Union of North America, AFL-CIO, herein called Stereotypers; Detroit Mailers Union #4, International Mailers Union, herein called Mailers; Newspaper Drivers & Handlers' Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehouse-

[4] The Free Press, the News, and the Association may variously be referred to herein as the Respondents.

men and Helpers of America, Ind., herein called Teamsters; Newspaper Guild of Detroit, American Newspaper Guild, AFL-CIO, herein called Guild; and Local No. 58, International Brotherhood of Electrical Workers, AFL-CIO, herein called IBEW. The remaining organizations are: Detroit Typographical Union Local No. 18, International Typographical Union, herein called ITU; Local No. 547, International Union of Operating Engineers, herein called Engineers; District Lodge No. 60, International Association of Machinists, herein called Machinists; Garage Mechanics #698, International Association of Machinists, herein called Mechanics; Local No. 79, Building Service Employees; and a local (number unknown) of the Brotherhood of Carpenters and Joiners of America, herein called Carpenters.[5]

I find that all of the above organizations are labor organizations within the meaning of the Act.

III. The alleged unfair labor practices.

A. The issues.

The amended complaint, as further amended at the hearing, alleges, in substance, that the Free Press and the News and their agent, the Association, on and after November 2, 1961,[6] have been parties to, have maintained, and have given effect to an agreement, arrangement, understanding and practice—often referred to by the parties as a "pact"; for convenience' sake, the term "suspension agreement" will be used herein—to the effect that, if either the Free Press or the News is faced with a strike,

[5] The following of the organizations named were represented at this hearing: Photo-Engravers, Stereotypers, Mailers, Teamsters, Guild, and IBEW. The rest were not.

[6] The parties are in agreement that the "10(b)" period with respect to this allegation shall be computed from May 2, 1962, the date of service of a number of the instant charges.

stoppage of work, picket line, or refusal to cross a picket line, or with a threat thereof, on the part of any of its employees represented by a labor organization, the other newspaper would suspend its operations. Putting it bluntly, the General Counsel contends that the two newspapers and their agent, the Association, had agreed between them that any strike—or strike threat—against one newspaper would be considered a strike or threat against both, and that the newspaper not directly the target of the strike or strike threat would lock out its employees until the matter had been settled.

Pursuant to this suspension agreement—the allegations of the complaint and the arguments of the General Counsel continue—one or another of Respondents locked out its employees on a number of occasions:

(a) On or about February 15, 1962, the Free Press suspended its publishing operations while the News was engaged in a labor dispute.

(b) On April 12, 13, and 14, 1962, the News suspended its publishing operations while the Free Press was engaged in a labor dispute.

(c) From April 16 through April 19, 1962, the News suspended its publishing operations and locked out its employees, while the Free Press was engaged in a labor dispute.

(d) On May 8 and 9, 1962, Free Press suspended its publishing operations and locked out its employees, while the News was engaged in a labor dispute.

Moreover, it is the theory of the General Counsel that, even if the allegation of the existence of the suspension agreement fails for lack of proof, the incidents (a)-(d) above would nevertheless constitute unfair labor practices: By the Free Press in (a) and (d); and by the News in (b) and (c).

Finally, it is the contention of the General Counsel, that the News, in the publication of a "double-masthead" dated April 15, 1962, while the Free Press was engaged in a labor dispute, sought to provoke a strike among employees at the News.

Respondents, in pleadings and arguments, take a number of positions. Denying that the suspension agreement existed, they urge, alternatively, that, even if there were such a pact, it would not be unlawful in the absence of implementation; in short, the mere existence of an agreement by each newspaper to close down in the event of economic pressure exerted on the other by a union would not constitute a *per se* violation of the Act. As for the instances of alleged shutdowns and lockouts, they contend that there actions in these respects were justified (1) as lawful defensive actions to protect the integrity of a multiemployer unit, (2) as lawful defensive actions in the face of an imminent strike, (3) as dictated by economic necessity, and (4) as provoked by harassing union tactics. In this connection they argue that, with exceptions not relevant hereto, bargaining with the affected Unions was multiemployer and joint; specifically—in opposition to the position taken by the General Counsel—that bargaining with the Teamsters and With PPH was joint rather than individual.

With respect to the double-masthead, the News, in effect, denies that the publication thereof was designed to provoke any action by a union.

B. The setting.

The *Free Press* is a so-called morning newspaper whose first weekday edition is on the streets at or about 7 p. m. on the evening before and whose last edition is distributed at or about 2 a. m. of the date appearing in the masthead. The *News* is an afternoon newspaper, its weekday editions being distributed between late morning and 4 p. m. Both

newspapers have Sunday editions, which are available on Saturday night and Sunday morning.

The circulation of the Free Press approximates 550,000 weekdays and 600,000 Sundays; that of the News, 725,000 and 915,000 respectively. The Free Press employs upwards of 1,400 employees and the News employs just over 2,500.

As is customary in the newspaper publishing business, the employees of both newspapers, generally speaking, are organized on a craft basis. The two newspapers deal with the 14 unions listed in "The Unions," *supra*, with whom they normally have a total of 21 collective-bargaining contracts.

To lend understanding to this matter, it appears in order to set down here a sketchy summary of the publication process of the two newspapers here involved. Employees of the advertising department procure advertisements, reporters obtain and write news, and editorial department employees prepare editorials and other features. Pictures at the News are processed into plates by its photo-engravers; the Free Press uses commercial shops for this purpose. The work-product goes to the composing room, where it is set up into forms by typographers. The stereotypers convert the forms, successively, into matrices and into plates curved to fit the presses. The paper and plate handlers transport the plates to the presses for the pressmen to affix. (They also transport the newsprint to presses and install it.) The pressmen operate the presses which print and fold the newspaper. Mailers then assemble the papers and transport them to truck tailgates. Platform men, drivers, and helpers load the trucks, and drivers deliver the contents to "drop stations," discussed elsewhere herein.

With respect to all times relevant hereto, the pleadings, stipulations, concessions, and testimony establish, and I

find (1) that both newspapers dealt jointly, for single appropriate bargaining units of employees employed by both papers and in single contracts signed by both publishers, with the Pressmen, Stereotypers, Mailers, and ITU; (2) that both newspapers dealt jointly, for single appropriate units of employees employed by both papers but in separate contracts differing only in details, signed by each publisher, with IBEW, Engineers, Machinists, and Mechanics;[7] (3) that the Free Press dealt separately with the Guild for its editorial, advertising, business office, inside circulation, and miscellaneous department employees, with the Building Service Employees for its maintenance employees,[8] and with the Carpenters for its carpenters; and (4) that the News dealt separately with the Photo-Engravers for its photo-engravers and with the Guild for its janitors, watchmen, and maids.

Respondents contend that both publishers dealt jointly with the Teamsters and with PPH; the General Counsel

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[7] The foregoing eight unions were alleged in the complaint to be bargaining jointly with the publishers, and Respondents' answers admitted the fact. At a late stage in the hearing, apparently because he felt that certain testimony elicited with respect to the bargaining history of IBEW, Engineers, Machinists and Mechanics might, by analogy, prejudice his contention of individual bargaining by Teamsters—see *infra*—counsel for the General Counsel moved to amend the complaint to allege individual bargaining by IBEW, Engineers, Machinists, and Mechanics. The motion to amend was denied. That ruling is here reaffirmed; to have ruled otherwise, on the eighth day of hearing, might, in my opinion, have resulted in prejudice to Respondents in their preparation for this hearing and in their cross-examination of prior witnesses. At any rate, the General Counsel is not prejudiced by this ruling since—as will be seen—I do not rely in my ultimate conclusion as to the bargaining relationship between the Teamsters and the publishers, upon any similarities to or differences from the relationships between these four unions and the publishers.

I note that, in his brief, counsel for the General Counsel retreats to his original position—that IBEW, Engineers, Machinists, and Mechanics each bargain on a multiemployer basis.

[8] There were two bargaining units among the two collective-bargaining agreements covering maintenance employees at the Free Press: one for the janitors, the other for elevator operators and watchmen.

contends that they did not. The facts, discussion, and conclusions in these respects will be found *infra*.

C. Chronology of events.[9]

1. In July of 1953,[10] the pressmen at the Free Press demanded premium pay for work on Independence Day. In support of their demand, they refused to work. The Free Press business manager, having ascertained that the News and the Times (a division of Hearst Publishing, at that time the city's third major newspaper and a member of the Association) planned to publish their respective newspapers that day, issued orders that the demand of the pressmen be acceded to under protest. Publication of the Free Press was delayed 5½ hours; there was no interruption of publication of the other two newspapers.

2. In December of 1955 and January of 1956, publication of the *Free Press*, the *News* and the *Times* was suspended for 46 days. The stoppage began as the result of a strike by the Stereotypers in support of contract demands and a picket line around all three newspapers. Subsequently, other unions representing employees of one or more of the three newspapers decided that completion of their pending contract negotiations would be the price of their return to work. Eight contracts were negotiated to end the strike, and publication was resumed on January 17, 1956.

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[9] My findings of what occurred—or did not occur—as recited in this section will not be repeated elsewhere in this report. References to items in this section will take the form of the abbreviation *"Chron."* followed by the item number or numbers being alluded to.

[10] I here reaffirm a ruling made at the hearing over Respondents' objection—that evidence of events occurring prior to November 2, 1961, the "10(b) date" herein, was properly admissible. I shall consider such evidence for whatever light it may throw on occurrences within the 6 months preceding the filing of charges.

3. At or about 3 a. m. on August 17, 1957, 67 mailers employed by the News refused to work overtime. That evening when they reported for work they were discharged, and a picket line was installed at the News. The picket line was honored by the Teamsters, and the News suspended publication.

That evening, bearing the dateline Sunday, August 18, the Free Press and the Times each printed and caused to be distributed a so-called double-masthead, respectively the *Free Press and News* and the *Times and News*. After the distribution of these editions, the Free Press and the Times suspended publication of their newspapers. A notice posted by the Free Press informed its employees that their services would not be required until further notice.

After approximately 1 week, a settlement was reached; 61 mailers to be reinstated and the cases of the rest to be further negotiated. The picket line at the News was discontinued and publication of all three newspapers was resumed.[11]

4. During the morning of Wednesday, September 3, 1958, Joseph Eckhout, the Pressmen's chapel chairman at the Free Press, was discharged for countermanding a foreman's order. The Free Press pressmen reported for work that evening but instead of going to their workplaces went into meeting. This halted publication of the *Free Press*. It was the position of the publishers that the pressmen's action violated the joint contract with the three news-

[11] Although the matter was not gone into in detail at this hearing, this incident bore overtones of an intraunion dispute. At that time Detroit Mailers Union No. 40, International Typographical Union—not to be confused with the ITU (Local No. 18) which represents the newspapers' typographers—represented the mailers of all three newspapers. The pickets, apparently, were defectors from Local 40, ITU, and a National Labor Relations Board representation proceeding was pending. Subsequently, the Mailers succeeded Local 40, ITU, as bargaining agent for the mailers employed by the newspapers.

papers, and, for this reason, publication of the *News* and the *Times* was suspended Thursday morning.

After a union meeting held on Friday night, the International Pressmen's president announced that all pressmen would return to work on the following day. Although this came too late for publication on Saturday, all three newspapers put out Sunday editions.

5. On Labor Day, 1959, 12 of 76 pressmen at the News walked out in a dispute over lunch periods that day. Others joined in the walkout the next day, the effect of which was to stop publication of the *News*. The Free Press and the Times suspended publication. The suspension of publication of all three newspapers ended a few days later when the Pressmen's International ordered the News pressmen to return to work.

6. On November 7, 1960, the *Times* went out of existence.

7. For 4 or 5 days beginning August 19, 1961, a number of persons, in support of economic pressure being exerted by a local union of the Pressmen International (not involved here) upon a Miami newspaper, picketed the Free Press. The picket line was honored by the Pressmen, and the Free Press did not publish during this period.

During the same period, the News, which was not being picketed, maintained its normal operations and put out its newspaper.

8. For a number of years, the Free Press and the News —and the Times, when it was in existence—had bargained jointly with the PPH. On or about September 25, 1961, in connection with its notice of intention to open negotiations for a new contract following the expiration, on November 30, 1961, of its then existing contract, PPH asked for separate bargaining with the Free Press and the News. On or about October 31, 1961, the publishers, through the

Association, rejected the request; they insisted on a continuation of joint bargaining.[12] Thereafter, PPH did bargain jointly with the publishers. In January 1962, PPH notified the publishers that its membership had authorized strike action. However, by February 14, 1962, negotiations for a new contract between PPH and the publishers had not been completed.

9. Between February 7 and February 12, 1962,[13] inclusive, a number of short work-interruptions took place among the paper and plate handlers of both publishers: There were two such interruptions on February 7 at the News, two more on February 9 at the News, and one each on February 12 at the News and at the Free Press. While delays may have occurred, none of these interruptions brought about a failure to publish.

I find that the cause of the interruptions (which took the form of chapel "meetings") was the concern among the paper and plate handlers over the status of contract negotiations.

On February 12, at or about 1 p. m.—before that day's interruption at the Free Press took place—Robert Butz, executive secretary of the Association, called together representatives of the various unions with which the publishers dealt. Members of management of both the Free Press and the News were present. Butz read to those assembled a telegram he had that day sent to the president of the PPH international:

> Paper and Plate Handlers Local No. 10 Have Created a Number of Work Stoppages at the Detroit News Since Last Wednesday, February 7. This Har-

[12] It was on the basis of this request and rejection that—as noted in *"The Issues," supra*—the General Counsel alleged that bargaining between the publishers and PPH since on or about October 2, 1961, was individual rather than joint.

[13] Unless otherwise indicated, all incidents described hereinafter in this section occurred in 1962.

assing Procedure Continues Today. But It Cannot and Will Not, Be Further Tolerated. The Publishers Intend to Either Operate These Newspapers on a Normal Schedule to Meet Production Needs or They Will Not Be Operated at All. A Definite Commitment as to Whether the Membership of Local No. 10 Will, or Will Not, Work Is Necessary Today. The Publishers Continue to Be Ready and Willing to Negotiate With Respect to the Expired Contract With Local No. 10 at Any Time Convenient to Both Parties. We Request That You Use Your Offices in Bringing This Matter to a Satisfactory and Immediate Conclusion.

Detroit Newspaper
Publishers Association
Robert C. Butz

Although requested, he declined to give those present copies of the telegram, but he reread it slowly so that they could take it down.[14]

Later that day, the president of PPH international sent a telegram to PPH (local) president informing him that, if the charges in Butz' telegram were true, PPH members must refrain from engaging in such interruptions.

10. Both newspapers published on February 13.

11. During the morning of February 14, the paper and plate handlers at the News, members of the PPH chapel

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[14] There was testimony by Guild President Schram and Teamsters President O'Connor that, in addition, Butz said, in effect, that if there was a repetition of the interruptions, both papers would shut down. Butz denied that there was any discussion other than that found above. Schram's and O'Connor's testimony on this point was vague. I believe that they misinterpreted the "warning" contained in the telegram, which although it complained of employee action at one newspaper, did speak of the production needs of both papers.

there, stopped work to have a meeting. Allegedly, the subjects under discussion were seniority rights, safety conditions, and the "repicking" of jobs—i. e., the right to bid for vacancies.[15] During the course of the meeting, the men were directed by management to go back to their work, but they declined to do so until their meeting was over; shortly thereafter, they were told that their services were no longer needed and that they should vacate the premises. They left.

The *News* was not published that day. At the Free Press that evening, no employees were sent home or lost pay, but the *Free Press* under dateline of February 15 was not published.

12. Meanwhile, a negotiating meeting between the publishers and PPH had been scheduled for 10 a. m., on February 14.[16] Because of the interruption that morning at the News—see *Chron.* 11—Butz had communicated with PPH international representatives and had rescheduled the meeting to 3 p. m. The parties—representatives of the publishers, international representatives of PPH, and the (local) PPH committee—met at that time. The meeting was recessed at 5 a. m. on February 15 and was resumed at 9 a. m. The result was an agreement to arbitrate the terms of a new contract.

13. That morning—February 15—the News' paper and plate handlers reported for work; after a short delay

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[15] I find that "repicking" was also an unsettled issue at the Free Press. Indeed, viewed in context—this being one of a series of on-the-job chapel meetings at the News and at the Free Press, my finding (in *Chron.* 9) that the paper and plate handlers of both newspapers were concerned with the status of current contract negotiations; and the fact that at this very time contract negotiations were being carried on—I find that the real cause of the February 14 shutdown by the News' paper and plate handlers was their dissatisfaction with or their efforts to influence the contract negotiations.

[16] A continuation of a meeting held on February 13.

because no sign-in sheets were available, they went to work. The *News* was published that day. So was the *Free Press*—bearing the dateline February 16.

14. The latest contracts between the Teamsters and the Free Press and the News, respectively, had expired on November 15, 1961. (Notices of a desire to revise the contracts were timely given.) Both the Free Press and the News, on or about November 13, had requested an indefinite extension of each contract subject to termination by either party on 5 days' notice, but the Teamsters had rejected these requests; thereafter, the terms of the respective contracts were continued on a day-to-day basis. Negotiations between the Teamsters and the Free Press and the News, respectively, had been carried on,[17] without success. At some point early in the negotiations, the negotiating committee was given strike authority, a fact which was communicated to the publishers.[18]

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[17] The record contains the dates of negotiating sessions. No meetings were held on the News contract between January 11 and March 22; although meetings between these dates were requested by the News, the Teamsters did not honor the requests (1) because they were "too busy," (2) because they were "making progress" on the Free Press negotiations, (3) because of reasons not appearing in this record, or (4) because of some combination of these reasons. Meanwhile, six sessions had been held on the Free Press contract.

[18] I so find on the basis of the credited testimony considered in context. On December 4, 1961, the News "unit"—this term will be explained in "Teamsters bargaining—joint or individual?" *infra*—of the Teamsters voted to authorize any action necessary in support of an acceptable contract with the News; although Joseph Prebenda, Teamsters' secretary-treasurer did not know if this information had been transmitted to the News, he assumed they were aware of it—newspaper reporters were present when the action was takn. Butz, without contradiction, testified that he was advised by a Teamsters representative, in December 1961, of an overwhelming strike vote concerning the News (testimony corroborated by James Dorris, the News' associate business manager in charge of labor relations), and, prior to March 22, 1962, of a similar vote being taken among the Free Press employees.

The General Counsel urged that the basis for the resolution of the News unit authorizing strike action was tied to a particular

On April 6, the "latest" revised proposal of the Teamsters with respect to a new Free Press contract was presented to the Free Press, with the statement that a membership meeting was being held on April 11 at which the stewards and executive board of the Teamsters would recommend strike action as of 4 p. m. on that date if a satisfactory offer had not been received from the Free Press. They (the Teamsters) were asked to reconsider their demands and to formulate what they considered those requirements the failure to grant which would call for a strike. The Teamsters gave the matter further thought and, later that day or during the next day, transmitted a slightly revised set of proposals.

On April 9 and 10, representatives of the Free Press met with those of the News to discuss what they considered to be their common problems *vis-a-vis* the Teamsters. They concluded, looking at the "18 issues remaining" between the Free Press and the Teamsters, that 10 were "joint"—i. e., of interest to the News in its negotiations as well. Of these 10, the News representatives urged the Free Press not to "give in" under any circumstances on 3: The Teamsters' demand for union consent in advance of any changes in the operations of the circulation department, the definition of the workday or workweek, and a demand for what the publishers considered to be a greater wage increase than had been granted to other unions in this round of contracts. The News agreed that, if the Free Press was struck because of its refusal to give in on any of these demands "the News would support the Free Press and would not publish"—a position which, it was further agreed, would not be communicated to the Teamsters.

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grievance (bidding for jobs) rather than to the negotiations of a new contract. The supporting testimony was vague, to say the least; at any rate, this reason for the strike authorization was not conveyed to the News. I find that, the News reasonably understood that the News unit's strike authorization was related to the negotiations for a new contract.

On April 10, representatives of the Free Press and of the Teamsters met. Some concessions were made by both sides, but full agreement was not reached.

At midday on April 11, the Free Press gave the Teamsters its "latest best" offer.

15. That afternoon—April 11—there was a meeting of the members of the Free Press unit of the Teamsters. The negotiating committee presented the Free Press' latest offer to them. They rejected the offer, and at 4:20 p. m. on that day, they set up a picket line at the Free Press, which line was maintained until April 19. Because of this picket line, publication of the *Free Press* was suspended from April 11 through April 19.

16. The last meeting between the Teamsters and the News had taken place on March 22. At that time, it was arranged that the Teamsters would submit revised proposals for their new contract. On April 12, a set of revised proposals, dated April 9, were received by the News —after the picket line at the Free Press had been installed.

17. As indicated, a picket line had been set up at the Free Press. There was no picket line at the News. Nevertheless, the News put out no paper for April 12, 13, or 14. During this period, its employees reported for work, and none of them lost any pay.

18. Pursuant to a joint decision of the publishers made two days earlier, the News, on Saturday, April 14, under the dateline of Sunday, April 15, prepared a double-masthead newspaper called *The Detroit News-The Detroit Free Press,* "A Temporarily Combined Edition" (One or more of the involved unions had been notified in advance of the News' intention to publish such a newspaper and after consultation had agree to perform the work necessary for its preparation.) A somewhat larger number of papers

was printed than was normally printed by the News; a somewhat larger-than-normal complement of employees was used;[19] and a somewhat greater-than-normal amount of overtime was performed. News drivers were instructed to pick up certain inserts from the Free Press plant despite the fact that their union, the Teamsters, was maintaining a picket line at that location; and, having cleared in advance with officials of that union, they did make the requested pickups. The combined edition, when distributed, contained features regularly appearing in the *Free Press,* including comics and supplements picked up at the Free Press plant, and advertisements by Free Press advertisers. Distribution was made by News Drivers, to Free Press as well as to News drop stations.

The cost of producing the combined edition was undertaken by the News, except for those parts which had been picked up from the Free Press plant. There was no charge to advertisers for those advertisements which would have appeared in the Free Press only; Free Press subscriptions were extended in cases where Free Press subscribers received no copy; and the only income received by the Free Press was from those Free Press subscribers who received and paid for copies.

The total cost of publishing the double-masthead—as contrasted with normal publication of each paper separately—is probably incapable of computation.

19. After the issuance of the double-masthead of April 15, the News notified various of its employees that they need not report for work until further notice. The notification was made by telephone calls or telegrams to union representatives, announcements over television and radio, and notices posted at the News building. The doors were not physically locked, but any employee (not scheduled to

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[19] The extra employees were persons usually employed by the Free Press or by other employers in the city.

work) was accompanied by a guard if he wanted to go to his workplace to pick up tools.

On April 16 and 17, the News did not publish. Instead, on one or both of those days, 50 pressmen and a number of paper and plate handlers were brought in to "clean up" the presses, a procedure made necessary when it is anticipated that the presses will not roll for a period of time, and a number of paper and plate handlers unloaded newsprint from standing boxcars.

20. Meanwhile, shortly after the Teamsters' picket line was established at the Free Press on April 11, contact between the parties to resolve the issues was established. On the afternoon of April 12, the Teamsters and the Free Press met with Federal and State mediators, but no agreement was reached.

On April 13, James Hoffa, Teamsters' international president, made a telephone call to Robert Butz, association executive secretary; as a result, a meeting of the Teamsters and the Free Press was arranged for 3 o'clock. The meeting,[20] a 4-hour session, achieved no concrete results.

On April 14, the Teamsters, including Hoffa, met with the Free Press in the morning and with the News in the afternoon. The pending issues were not settled at these meetings. (At the meeting with the News, Hoffa protested against the double-masthead about to be produced and asked if the News intended to put out any more; he was told that the News had no plans for doublt-mastheads beyond the one then in preparation for distribution that night. At the same meeting, the Teamsters said they

[20] I credit Butz' testimony that Hoffa said, in this telephone acll, "the News had better be present or on a standby basis at the meeting because the issues at the News would have to be settled or they'd be on strike also." (Hoffa did not testify.) As a result of the remark, representatives of the News "stood by" during the meeting between the Free Press and the News; however, they did not attend or participate in the discussions.

would present the News' latest proposals to the membership.)

Pursuant to an exchange of communications by telegram and telephone, a meeting was arranged to be held on Wednesday, April 18, at 10 a. m. at the offices of Detroit Police Commissioner Edwards. Present at that meeting, in addition to Commissioner Edwards, were Federal and State mediators, Butz, representatives of both publishers, and representatives of the Teamsters. This "mediation-negotiation" took place with the publishers in one room, the Teamsters in another, and Edwards traveling back and forth. The session lasted 33 hours—until 7 p. m. on the 19th. The results: Full agreement was reached on the Free Press contract,[21] and the picket line was to be removed; agreement was reached on some issues in the News' contract, other issues were to be further discussed, and all issues not resolved by the further discussion were to be arbitrated.[22]

21. Shorty after 7 p. m. on April 19, the Teamsters' picketing of the Free Press ended. Meanwhile—except for the double masthead of April 15—neither the *Free Press* nor the *News* had been published since the afternoon of April 11.

22. As soon as agreement was reached, both newspapers announced plans for a resumption of operations, but the

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[21] The agreement was approved by the Teamsters' Free Press unit on April 20. It was subsequently reduced to writing, in May, but the last signature—that of Joseph Prebenda, Teamsters' secretary-treasurer—had not yet been affixed as of September 20, the 4th day of this hearing. Despite the fact that—in their brief—Respondents seem to question that a Teamsters-Free Press 1961-1963 contract was consummated on April 19, there appears to be no issue as of this time that a *de facto* contract between the Teamsters and the Free Press has indeed been reached.

[22] Three meetings were held between the Teamsters and the News in May to narrow the issues further. As of October 30, the ninth day of this hearing, the arbitration proceeding was scheduled to be held on November 15-17.

typographers represented by the ITU refused to return to work. On Friday, April 20, in alleged protest against the lockout by the News,[23] they voted to strike against and began picketing both newspapers. This interrupted plans to resume operations.

23. At or about the same time—April 20—PPH, upon receipt of advice that the issues between the Teamsters and the Free Press had been resolved, held a membership meeting. There was a discussion as to whether members of PPH would return to work until they had been compensated by the News for the alleged lockout just ended and until all "differences" between them and the Free Press had been adjusted. As earlier indicated, however, the ITU had set up a picket line about both newspapers, and these actions of PPH had no immediate impact.

24. On or about April 27, the publishers offered, in addition to concessions made during prior negotiations, certain production changes asked by the ITU. On Sunday, May 6, the ITU accepted the publishers' offer and its picket lines were removed.

25. Meanwhile, on or about April 30, representatives of the publishers and of PPH had met. The publishers had rejected PPH's claim for compensation by the News for the alleged lockout of April 16-19. During the evening of May 6, the ITU's picket lines having been removed, a representative of the Free Press asked Bart Piscitello, PPH president, if his people would report for work on the following morning if called. Piscitello replied that he did not know—that the membership had

[23] There is dispute as to whether this was the true reason for their action. ITU's last contract with the newspaper had expired, by its terms, on November 30, 1961, and the terms of a new contract had not been reached. The publishers contend that the ITU action (1) was motivated by the state of the contract rather than by the alleged lockout and (2) was one of a series of "whipsawing" tactics by the involved unions.

voted (on April 20) not to return to work until another membership meeting had been held and that a meeting was scheduled for the next afternoon, May 7. As a matter of fact, individual paper and plate handlers were asked by the Free Press to report for work on May 7; when they made inquiry of Piscitello, they were told not to report, and they did not.

26. During the early hours of May 7, individual members of PPH began picketing the News, their signs protesting a lockout in violation of agreement.[24] There was a membership meeting commencing about noon on May 7, at which the membership decided to sanction and to continue the picketing at the News, as a protest to its lockout. After the meeting, Piscitello publicly announced the willingness of members of PPH to report for work at the Free Press; moreover, in response to a specific inquiry by the Free Press PPH chapel chairman, the Free Press paper and plate handlers' foreman said that, with respect to May 8, he had no orders for a "markup" i. e., a scheduling of work.

27. As indicated, the Free Press, during the evening of May 6, had asked certain paper and plate handlers to report for work next morning; it also requested certain pressmen to report.[25] None of the paper and plate handlers reported, except that at least one went to the Free Press building and, allegedly, found the garage locked. The pressmen who reported allegedly found their normal work entrances locked.

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[24] The agreement referred to was an agreement to arbitrate collective-bargaining issues dated February 15, 1962, which agreement among other things, forbade any interruptions of work pending the arbitration. See *Chron.* 12.

[25] In order to resume publication after a period of idleness, only a number of "preparation" men—paper and plate handlers and pressmen—were necessary at the first stage. Only these were notified to report.

Much was made at the hearing of whether there was a literal lockout on the morning of May 6. Witnesses for the General Counsel and for the Free Press testified, respectively, that the work entrances were locked and were not locked. A resolution of the issue does not require crediting the witnesses for one side and discrediting those for the other.[26] I can and do credit them all; I find that, at or about 7 or 7:30 a.m., the doors were unlocked but that, at or about 9 a.m., reporting time, they were not.

I gain nothing, however, by this determination. While I would normally charge the owner of the doors with their condition (locked-ness) as of the time employees were supposed to report, I cannot do so here with impunity. First, the Free Press had, in fact, called employees in; second, steps were taken at an early hour to see that the doors were open to receive the employees.[27] That an "outsider" thereafter locked the doors is an explanation as compatible with reality as that they were locked by the Free Press.

Fortunately, an answer to the question, "Who locked the doors?" is unnecessary to the disposition of this matter, for the General Counsel does not charge the Free Press with unlawful lockout action on May 7.

28. On May 8 and 9, because of PPH's licket line there, the News did not publish.

There was no picket line at the Free Press, but no *Free Press* was published on those days. There is a dis-

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[26] All witnesses on the issue appeared to be credible.

[27] The General Counsel broadly insinuates that, although the Free Press may have been acting in good faith when it issued recall orders during the evening of May 6, it changed its mind when a picket line appeared at the News during the early hours of May 7 and, pursuant to the alleged pact, decided to refrain from resuming operations.

pute as to whether (1) the Free Press, unpublished since April 11, failed to resume operations of its own volition, or (2) its employees were withholding their services. Factually—and I here reserve any legal conclusions—the resolution of this question largley depends upon whether there was a desire by the Free Press, communicated or otherwise, that its employees report for work on these days, and upon whether its employees were willing to report for work.[28]

I find that, at least during the evening of Sunday, May 6, the Free Press fully expected to publish on May 7 and had taken the preliminary steps to procure work personnel. I have found it unnecessary—see *Chron.* 27—to determine, for purposes of this case, why the employees called did not report for work on the morning of the 7th.

At a meeting between the Pressmen and the publishers held on the morning of May 7, the question of the alleged failure of pressmen to report at the Free Press that morning came up; I find—and this is an amalgam of the credited testimony of the witnesses—that the publishers were notified that the Free Press' pressmen were ready and willing to report for work. At midday on May 7, just before or during a meeting of the pressmen, Foreman Crebassa of the Free Press informed Carroll, a pressman executive board member, that the order for pressmen that morning had been cancelled;[29] further, the Pressmen, that afternoon, informed the Free Press of the method by which

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[28] On May 6, 7, and 8, the Free Press prepared a "dummy" newspaper—i. e., an edition written and composed but not printed. This is normally prepared when there is a possibility of publication on the day in question.

[29] This is based upon the credited testimony of the witness Carroll. Weidler, business manager of the Free Press, stated that there never was a rescission of the call to work, but Crebassa did not testify.

its members should be recalled.[30] Also, as I have already found (see *Chron.* 26), PPH, the only other union whose members had failed to report on May 7, publicly announced the willingness of its members to work at the Free Press; indeed, its Free Press chapel chairman had been told by his foreman that no paper and plate handlers were scheduled to work on May 8. Nor, as far as this record reveals, were any mailers, for example, called to work on either May 6, 7, or 8.[31]

Accordingly, I find that the failure to publish the *Free Press* on May 8 and 9 was not due to the unwillingness or failure of employees to report for work.[32]

29. On Wednesday night, May 9, the membership of the PPH held a meeting. At this meeting, PPH ordered the members to return to work; thereafter, they voted to end the strike against the News, withdraw the picket line, and return to work.

That night or during the morning hours of May 10, employees of both newspapers were called back to work, and both resumed publication on May 10.

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[30] There was a contention that the offer was a conditional one—i. e., required the Free Press, contrary to its normal custom, to call for pressmen through the union rather than directly. Since, during a prolonged period of not working for their regular employer—they had done no work for the Free Press for almost a month—pressmen in Detroit often accept work engagements at other shops and since, in the event of a startup at the Free Press, the Pressmen would be obligated to "cover" for such pressmen by furnishing substitutes, I do not regard the requirement to recall through the union as indicating a desire on the part of the pressmen not to honor any Free Press call for employees. Significantly, when operations eventually resumed, the Free Press did call for pressmen through the union.

[31] The record shows that, although the *Free Press* was not published during this period, certain other employees, including composing room employees (represented by ITU), were on the payroll.

[32] Counsel for the Free Press does not contend that there was a *strike;* he contends merely that the Free Press did not publish on May 8 and 9 because key personnel would not report for work.

30. On May 10, 1962, representatives of the Guild met with members of the Free Press management. The subject of discussion was a telegram sent 2 days earlier from the Guild to the Association, which telegram protested the layoff of employees by the Free Press where "no labor dispute exists." In the course of the discussion, Mr. Weidler, business manager of the Free Press, said, "Don [Donald Schram, president of the Guild], you know very well the Free Press could not resume publication until the dispute with the plate and paper handlers had been resolved and they are ready to come back to work at both papers."[33]

31. On September 25, 1962, the fifth day of hearing herein, there was a stoppage of work at the News; the *News* dated September 26, was not published. Apparently, there was no interruption of work or failure to publish at the Free Press. In view of the absence of surrounding details in this record, I have not relied upon this incident in arriving at any of the conclusions or recommendations contained in this report.

D. Discussion and conclusions.

1. Independent interference, restraint, or coercion.

The complaint contained no allegations of, nor did any party at the hearing present evidence of, any interference, restraint, or coercion of employees' Section 7 rights independent of that which might be inferred from the alleged suspension agreement, the alleged lockouts of February, April, and May of 1962, and the publication of the double-masthead of April 15, 1962.

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[33] Credited testimony of Donald Schram.

2. The suspension agreement.

The complaint alleges that, since November 2, 1961, the Free Press, the News, and the Association have performed, maintained, and given effect to an agreement, arrangement, understanding, and practice, relating to the hire, tenure, or other conditions of employment of its employees, providing, *inter alia*, that either the Free Press or the News will suspend its newspaper publishing operations in the event that employees of the other publisher who are represented by a labor organization concertedly threaten to engage in or engage in a strike or work stoppage, or concertedly threaten to honor a picket line established by any labor organization of such publisher, or in any other manner concertedly threaten to engage in or engage in a failure or refusal to perform services. Stripped of legal niceties—as made clear by counsel for the General Counsel during the hearing—it is contended that the three Respondents were and are parties to a longstanding agreement that, if any of the publishers (including the Times, when it was in existence) should be hit by a strike or strike threat of any union, the other publisher(s) would, in support of the "target" publisher, suspend his (their) publishing operations in order to exert pressure on the moving union.

Complicated as was the sequence of occurrences described in the "Chronology of events," *supra*, such controversy as there was in that area concerned itself with more or less routine details. But on this issue—the existence of a suspension agreement—the parties had no common meeting ground. Counsel for the General Counsel vehemently argued that the existence of the pact was a matter of "public notice" among Detroiters and that, indeed—and this is my paraphrase—one of the difficulties, if any, or proof, arose out of the fact that the pact's existence was so well known that some difficulty is encountered in distinguishing between primary sources of in-

formation and common repute. The Respondents, on the other hand, deny that a suspension agreement exists; in effect, they say it is a figment of someone's imagination.

The evidence in support of, or in opposition to, the contention of the General Counsel took a number of forms.

Pertinent quotations appearing in the *Free Press* and the *News* over a period of years were introduced.

In the *News* of August 24, 1957, at the conclusion of the suspension of publication arising out of the News mailers' refusal to work overtime (see *Chron.* 3), there was a story covering the incident. The article noted that, after publishing double-mastheads on August 18, the Free Press and the Times had suspended publication "explaining that a strike against one newspaper is a strike against all three." Next morning, a news item on the same subject appearing in the *Free Press* attributed an announcement to the Association as of the previous Sunday, August 18: "An illegal shutdown against the Detroit News is forcing a shutdown of all three papers. . . . The [Association] makes contracts for the Detroit Free Press, News, and Times jointly. Under these joint contracts, a strike against one newspaper is a strike against all. . . . A group of News mailing room employees who have no contract with any of the three papers threw a picket line around the News Saturday. . . . When the illegal strike continued Sunday, the [Association] had no choice but to suspend publication of all three daily papers."[34] On the same day, in a followup story, the

[34] The Association, at the hearing, denied having made this announcement. Pursuant to a subpena, the Association produced, from its files, an undated, unsigned "statement" which, the General Counsel argued, was the statement being quoted from. Butz, executive secretary of the Association, remembered having issued no such statement—indeed, denied that the alleged statement was an accurate statement of the facts. Since the document in question, otherwise unexplained, came from the Association's files and since its language remarkedly accords with that quoted by the *Free Press*, I find that it was in fact a statement of the Association.

News, in part, said, "The [Association] which negotiates and signs contracts with all the newspaper unions, explained that the walkout against one paper was a walkout against all."

On September 7, 1958, when Detroit's newspapers resumed publication after the 3-day interruption occasioned by the discharge of a *Free Press* Pressmen's chapel chairman for countermanding a foreman's order (*Chron.* 4), the *News* announced, in the course of its story of the interruption, "The position of the publishers was that this development at the Free Press was a work stoppage in violation of a joint contract with the three newspapers. . . . Publication of the *News* and *Times* thus was suspended Thursday morning."

On September 10, 1959, and September 11, 1959, respectively, the *News* and the *Free Press* reported on the pressmen's Labor Day walkout at the *News* (*Chron.* 5). An excerpt from the News story: "All three Detroit newspapers operate under a joint contract with the union and a strike against one is regarded as a strike against all." And from the *Free Press*: "Publication of the *Times* and the *Free Press* was also stopped because the three papers have a joint contract with Local 13 and a strike against one paper is considered a strike against all."

In August 1961 (see *Chron.* 7), an "outside" union closed down the *Free Press* by its picketing. The *News*, which did not suspend operations, editorialized on August 22: "Under normal conditions—and because of joint contracting—a local dispute that closed one Detroit paper would automatically close both. But this time, the 'grievance,' if any, is in Miami, beyond the reach of joint action by the TWO Detroit Publishers. There is nothing anyone in Detroit can 'negotiate.'"

On May 11, 1962, at the conclusion of a month-long shutdown of both papers (*Chron.* 15-29), the *Free Press* reprinted, from the New York *Times* of May 8, an article by Arthur Krock (whose column does not normally appear in the *Free Press*) containing the following statements: "In Detroit, there have been seven shutdowns in 7 years. This time the Teamsters' Union struck the *Free Press.* Then, after an agreement was reached with management on a new contract, the International Typographical Union set up a picket line on the ground that its members had been locked out when the *News,* in conformity with a local publishers' agreement that a strike against one member was a strike against both, suspended publication. . . . The weakness of this, an agreement that a strike against one member is a strike against all, was again demonstrated in Detroit."

Testimony and stipulations established that another medium was also used by Respondent's to convey their message. On May 8, 1962—on which date there was a PPH picket line at the News and a cessation of publication at both papers (*Chron.* 26-28)—the publishers, at a cost of $1,127.10, caused the Krock column referred to above to read on 11 occasions over five Detroit area radio stations,[35] each reading being accompanied by its identification as a paid advertisement of the Association.

There was some testimony that the fact of the existence of the suspension agreement was broadcast over certain Detroit television stations. Lacking either corroboration or details, I make no finding in this respect.

Testimony with respect to relevant statements by representatives of Respondents was also presented.

Most of these statements are attributed to Robert Butz, at all times relevant hereto executive secretary of the

[35] One of which was owned by the News.

Association.[36] It was credibly testified, and I find, that, on a number of occasions, he told union representatives (usually in response to queries) that a strike against one newspaper would be a strike against all (when the Times was publishing) or both (after the demise of the Times), and that if one paper was struck the other(s) would close.[37] He made such statements in October 1958, in the course of contract negotiations between the Teamsters and the Free Press; during an aribtration proceeding with the Pressmen; and on other occasions.[38] On this record, I do *not* find that he made such statements after November 2, 1961; and I specifically find (see *Chron.* 9), contrary to the testitmony of certain witnesses, that he did *not* make such statements on February 12, 1962.[39]

On May 9, 1962, over signatures of Lee Hills, vice-president and executive editor, and H. C. Weidler, business manager,[40] the Free Press sent its employees a letter

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[36] The pleadings and credited testimony established, and I find, that Butz was principal spokesman for the Association and, as such, was authorized to speak on all labor relations matters, for both the Free Press and the News as well as the Association.

[37] Butz, conceding that the subject was frequently raised, denied that he gave the answer attributed to him. His answer, according to his testimony: "Wait and see." "Try it and see." or "That can't be answered until it happens." I considered him to be evasive on this point.

[38] I am aware that an inability to pinpoint dates—and witnesses did display such inability—detracts from probity. But their testimony was bolstered by Butz' admission that the subject was raised on many occasions. (Indeed, Respondents, in their brief, seem to accept the fact of the frequent raising of the question by alluding to it to press the point—involved in another aspect of this case, discussed *infra*—that, for example, the Teamsters, in negotiations with one publisher, repeatedly injected the subject of the other publisher.)

[39] Also, I do not place in the category of statements bearing upon the existence of a suspension agreement Butz' jocular answers to equally jocular queries such as, "How is the big publishers' union doing?"

[40] I find Hills and Weidler to be responsible agents of the Free Press.

to which was attached a reprint of the Krock column, above referred to. And, on May 10, 1962, Weidler "explained" to Guild President Schram (see *Chron.* 30) that the Free Press could not have resumed publication [2 days earlier] until the paper and plate handlers were ready to come back to work at *both* papers.

At or about October, 1958, in the cuorse of negotiations with the Teamsters, Tade Walsh, circulation director of the Free Press,[41] said that if the Free Press were closed down, the News would close down.[42]

As noted in (*Chron.* 14), members of management of the Free Press and the News met to discuss their "common" problems *vis-a-vis* the Teamsters. James T. Dorris, the News' associate business manager in charge of labor relations,[43] memorialized for his superior an agreement reached between them: It was agreed between the two sets of management, that, should the Free Press be struck and unable to publish (because of a refusal to yield on certain points at issue), "the News would support the Free Press and would not publish"—a position which, it was further agreed, would not be communicated to the Teamsters.

Finally, as an aid in determining whether or not there was a suspension agreement, we must consider the conduct of the parties.

On every occasion but one during the past 6 years on which one of the two publishers has been hit by a picket line or a refusal to work, the other has suspended publication. There have been six such suspensions: In August

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41 I find Walsh to be a responsible agent of the Free Press.

42 Undenied by Walsh.

43 I find Dorris to be a responsible agent of the News.

1957, when mailers picketed the News (*Chron.* 3); in September 1958, when pressmen refused to work at the Free Press (*Chron.* 4); in September 1959, when pressmen walked out at the News (*Chron.* 5); on February 14, 1962, when paper and plate handlers stopped working at the News (*Chron.* 11); from April 11-19, 1962, when the Teamsters picketed the Free Press (*Chron.* 15); and on May 8 and 9, 1962, when PPH picketed the News (*Chron.* 28). The sole such occasion on which there was no concomitant suspension was in August 1961, when a "foreign" local picketed the Free Press.[44]

On the basis of the facts above recited—the quotations from the publishers' newspapers,[45] statements made by their representatives, and the history of suspension actions taken by the publishers—I find that, on and since November 2, 1961, the Free Press, the News, and their agent, the Association, have been and are parties to an agreement that, should either the Free Press or the News suffer a work stoppage because of employees' refusal to work or because of a picket line, the other would suspend its

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[44] I note that, in their brief, Respondents list the 1953 pressmen's incident at the Free Press (see *Chron.* 1) as an "exception" to the practice of supporting. I agree that this incident either (1) militates against a finding of the existence of a suspension pact, or (2) demonstrates that no such pact existed before the all-union strike of 1956-57 (see *Chron.* 2). I have duly considered this circumstance in arriving at my conclusions set forth below.

[45] Apparently, it is the position of Respondents that a newspaper is not responsible for what it publishes in its paper. Whatever its responsibility for statements on other matters, I regard a publisher in the absence of disclaimer, to be responsible for what it prints which bears upon its own policies.

On the other hand, in arriving at the conclusion above recited, I place no reliance on statements made in Mr. Krock's article, whether read over the air by the publishers, reprinted in the Free Press, or sent to its employees by the Free Press. A careful reading of the article demonstrates that Krock does not give as his source of information as to the suspension policy—"a strike against one is a strike against both"—the Respondents; he attributes it, rather, to the picketing union. Hence, it has no probative value as against Respondents.

own publishing operations.[46] The sole limitations on the agreed action, I find, were that, where the subject of dispute was such that its resolution was outside the scope or authority of either the Free Press or the News,[47] or where the dispute was with a union which did not deal with *both* of the publishers,[48] there would be no supportive suspension.

I specifically find that the suspension agreement was not confined to *joint bargaining* situations. The evidence clearly establishes, and I find, that it was intended to apply to situations in which the Teamsters[49] might strike one publisher or the other. In amplification thereof, it now appears necessary to discuss the relationship between the Teamsters and the respective publishers.

3. Teamsters' bargaining—joint or individual?

The Teamsters represent, for collective-bargaining purposes employees generally engaged in the distribution of

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[46] I reject Respondents' contention that the publication of double-mastheads in August 1957 (*Chron.* 3) and April 1962 (*Chron.* 18) negate the existence of the suspension agreement. While I would not necessarily find such publications to be violative of the Act—see *infra*—I regard such actions as corroborative rather than derogative of the arrangement.

[47] This limitation is established by the incident of "foreign" picketing in August 1961 (*Chron.* 7).

[48] In the absence of evidence to the contrary, I adopt Respondents' contention in this respect.

[49] Although I find that the suspension agreement applied also to strike action by PPH, I reject the General Counsel's contention that the publishers dealt individually rather than jointly with PPH. All the criteria of joint bargaining are present in this relationship: joint negotiations, single multiemployer contract, etc. The sole basis for the General Counsel's claim is that PPH made a timely demand for individual bargaining. However, the demand was rejected, and, thereafter, both the trappings and the spirit of joint bargaining were adhered to. An agreement to arbitrate the terms of a new (joint) contract was consummated (*Chron.* 12), which agreement was subsequently relied on by PPH as supportive of action taken against the News (*Chron.* 26).

six newspapers published in the Detroit metropolitan area. The *Free Press* and the *News*, whose publishers employ, respectively, 450 and 600 members of the Teamsters, are by far the largest of these newspapers.

The Free Press and the News, principally because they are distributed at different times of the day, each has its own peculiar distribution problems. Their distributive employees, although engaged in discharging the same basic function, perform different specific duties. For example, at one paper, distribution is made to substations, from which further distribution is made by others; at the other, the distributive employees service stands and boxes and supply various retail outlets, as well as make deliveries to carriers' homes. At one paper, distribution—by these employees—is limited to the so-called city zone; at the other, it is not. And, although it is apparent that some of them are overlapping, one publisher has 14 job classifications, the other 18.[50]

The Teamsters have represented such employees at both newspapers for at least 20 years.[51]

During this period, the working conditions of the employees have been crystallized in 2-year collective bargaining agreements—one for each publisher—usually expiring in November of the odd years. As far as this record reveals, the tenures of all past contracts, with either publisher have been identical.

(The last such contracts were effective, by their terms, until November 15, 1961, unless automatically renewed. In each case, the Teamsters gave timely notice of a desire

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[50] This is based upon testimony given at the hearing. Examination of the last expired contracts reveals that, at that time, the respective figures were 12 and 19, but the deviation is immaterial herein.

[51] There have been no relevant Board representation cases in the past.

to negotiate a new contract with changes. In each case, the Teamsters rejected a request for an indefinite extension of the contract pending negotiations, subject to a 5-day notice of termination; and in each case, as I have found, the terms of the 1959-1961 contracts were continued on a day-to-day basis.)

Contract negotiations are conducted[52] between the Teamsters and each publisher separately. Contract proposals are exchanged between the Teamsters and each publisher, copies normally being sent to Butz, the Association's executive secretary. The Teamsters and each publisher meet separately, although their meetings with the two publishers often "leapfrog" each other.[53] Normally present at each meeting are representatives of the publisher whose contract is being discussed, Butz, the Association executive secretary, and a Teamsters' negotiating committee consisting of employees and stewards employed by the affected newspaper and the local's executive board, consisting of its officers. The personnel normally common to both sets of meetings are Butz and O'Connor and Prebenda, respectively president and secretary-treasurer of the Teamsters.

(On perhaps six instances in the past 20 years the "other" paper has had observers present at a negotiating meeting between the Teamsters and a publisher; on the last occasion—in September 1958—union committee requested their withdrawal; the request was honored, and there has been no recurrence. On one occasion, the Teamsters asked Butz to withdraw, but this request was re-

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[52] Although I use the present tense here, I mean by my description (unless I specifically indicate the contrary) to cover circumstances extant at all relevant times. Witnesses' testimony and counsel's arguments interchangeably described existing and past conditions. Apparently, they recognized, and I find, that these descriptions covered the entire relevant period.

[53] Indeed, during the same period, the publishers, or either of them, may be conducting meetings with other of their employees' unions.

fused; and, as indicated, he continued to attend. On a number of occasions—notably, the last few meetings between the Teamsters and the Free Press prior to the April 1962 strike—the Teamsters have been represented by O'Connor and/or Prebenda alone.

(On April 18, 1962—see *Chron.* 20—at the "mediation-negotiation meeting" held at Commissioner Edwards' office, both publishers were present and both contracts were discussed. But the publishers were separated from the Teamsters, and the contracts were discussed seriatim rather than simultaneously. On the other hand, there is no doubt, and I find, that the publishers, themselves, discussed the issues they regarded as common.)

At these meetings, the main spokesmen for the publisher involved are the publisher's direct representatives, in contradistinction from those negotiations between the publishers and other unions, wherein Butz is the main spokesman for the publishers.

During the course of this process, insofar as the Teamsters are concerned, the progress of negotiations with a publisher is reported to and discussed with the employees of that particular publisher. Thus, the Teamsters, internally, is divided into a number of "units" composed of the respective employees of each publisher. The Free Press unit interests itself in negotiations with the Free Press; the News unit in negotiations with the News; and, similarly, there are units interested in negotiations with other employers.

Meanwhile, back at the publishers . . . Butz keeps either the Free Press or the News informed as to the state of negotiations between the Teamsters and the other paper. And occasionally—for an outstanding instance, see *Chron.* 14—representatives of the two publishers meet together, with Butz, to discuss what they consider to be common issues.

When tentative agreement is reached between the Teamsters and a publisher, it is presented to that publisher's unit within the Teamsters, and this unit ratifies or rejects the agreement. The finished, executed contract, as indicated, is separate from that of the other publisher.

(The dates of execution of the Free Press and the News' contracts have usually been identical since 1953. This was not true of the 1957-1959 contracts nor was it true of the 1961-1963 contracts—see *Chron.* 20.)

The contracts are separately administered, and grievances unsettled earlier are handled by a Joint Standing Committee. The Committee, a separate one under each contract, consists of three members appointed by the publisher involved and three members appointed by the Teamsters—in actuality, by the Teamsters' unit involved. (Butz represents the affected publisher on each Committee.) A grievance which cannot be adjusted by the Committee in the first instance is, in effect, arbitrated, since there is provision for the addition of a seventh member, on an *ad hoc* basis, to break the tie.

Much of this hearing was devoted to testimony and arguments intended to showing similarities and dissimilarities, and consistencies and inconsistencies, with respect to collective-bargaining issues both as contained in the last complete contracts between the Teamsters and the publishers and as contained in the various proposals of the parties in the latest negotiations for new contracts. Having given the evidence, both testimonial and documentary, full consideration, I find (for what it is worth) that there are similarities, dissimilarities, consistencies, and inconsistencies.[54] On the other hand, I find that there

[54] I confess myself somewhat confused as to the meaning of "inconsistencies" as used by the parties. For example, the 1961-1963 Teamsters contract of one of the publishers calls for the hiring of union members only, then requires *application for member-*

are perceptibly no more or less of these than might normally be found in collective-bargaining relationships between a union and two employers in the same industry who have many similar and some distinctive problems. I accept the contention of the General Counsel that one might expect a substantially common approach by a union dealing with such employers; going further, the fact that such employers might seek to take a common approach toward the union does not startle me.

(The basic wage rates for similar Teamsters employees of the two publishers are essentially similar, although their apportionment to a "package" differs slightly. [The increases sought in the most recent negotiations were the same; but they generally accorded with those sought by and granted to employees represented by other unions.] One publisher had a pension plan earlier than the other; now both have such plans, administered by separate boards.)

In resolving the question at hand, I would be inclined to give some weight to the opinions of the parties themselves as to the type of bargaining they were engaging in. I am handicapped in this respect by the fact that, until the question at hand arose, the subject received little attention from the parties. As I see it, they never discussed it. But, quite frankly, I believe that even the publishers regarded themselves as bargaining individually. In the *Free Press* of January 17, 1956, under the byline of William Chapman, assistant city editor, a news article recited that the "[Guild], [Photo-Engravers], and [Teamsters]—representing newspaper truckdrivers—negotiate separately with each newspaper," a statement never corrected. And, at this hearing, James T. Dorris,

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ship after 2 weeks; the other calls for the hiring of union members only if and when such a provision shall become lawful, and goes on to require union membership after 31 days. I assume all parties would term this both a dissimilarity and an inconsistency."

associate business manager of the Free Press, in charge of labor relations there since mid-1956, testified on cross-examination that it was not his position that the publishers bargained jointly with the Teamsters. (On redirect, he said he meant that the publishers would not sit down with the Teamsters in the same room.) I have no evidence of the Teamsters' past feelings on the matter.[55]

On balance, the total picture of negotiations, based on the credited testimony, convinces me, and I find, that the Teamsters bargained individually with each of the publishers.

4. Concluding findings on the suspension agreement.

Having found that Respondents were and are parties to an agreement that one publisher suspend publication in support of the other faced by strike or picket line, having found that the agreement encompassed situations involving strikes or picketing by the Teamsters, and having found that the Teamsters bargain individually rather than jointly with the publishers, I find that the breadth of the suspension agreement renders it violative of Section 8(a)(1) of the Act.

The Board has held that, absent special circumstances, an employer may not, during bargaining negotiations, either threaten to lock out or lock out his employees in aid of his bargaining position. Such conduct, the Board has held, presumptively infringes upon the collective-bargaining rights of employees, and the lockout amounts to discrimination.[56]

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[55] Because it would beg the question, I place no reliance, in this respect, on Teamsters' threats, past or present, to strike one newspaper and not the other; as equally question-begging, I do not rely on Butz' reaction—to close down both papers if one was struck.

[56] *American Brake Shoe Company*, 116 NLRB 820, set aside 244 F. 2d 489 (C. A. 7), finding special circumstances, contrary to Board determination.

The passing years have shed light on the meaning of the phrase "special circumstances." The Supreme Court has determined, in the so-called *Buffalo Linen* case,[57] that an employer may lock out his employees as a defensive measure to protect the integrity of a multiemployer bargaining unit against "whipsawing" by a union. Likewise, a lockout is permissible where hardship renders it economically unfeasible for an employer to maintain operations in the face of an imminent strike.[58] And I would assume, *a fortiori*, that an advance intention, or agreement between affected employers, to implement these rights would not be unlawful. Moreover, it has been specifically held that advance agreement to suspend operations in the event of a series of unauthorized work stoppages is not violative of the Act.[59]

It has never been held that the right to lock out employees is necessarily a corollary of employees' right to strike which is guaranteed by Section 7 of the Act.[60] And where it has been found that a lockout was motivated by a desire to defeat employees' organizational or otherwise protected activities, a violation has been found.[61]

Respondents argue for an extension of the *Buffalo Linen* doctrine to cover a lockout by employers over *com-*

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[57] *N. L. R. B. v. Teamsters* 449, 353 U. S. 87.

[58] *Betts Cadillac Olds, Inc.*, 96 NLRB 268 (inability to assure customers of completion of work); *Duluth Bottling Assn.*, 48 NLRB 1335 (spoilage of materials); *International Shoe Company*, 93 NLRB 907 (operative difficulties in running plant in face of partial strike among integrated departments).

[59] *Publishers' Association of New York City, et al.*, 139 NLRB No. 107.

[60] The Supreme Court, in *Buffalo Linen, supra*, specifically refrained from passing upon this question.

[61] *N. L. R. B. v. Somerset Classics*, 193 F. 2d 613 (C. A. 2), cert. denied 344 U. S. 816; *N. L. R. B. v. Wallick and Schwalm*, 198 F. 2d 477 (C. A. 3); *Olin Industries v. N. L. R. B.*, 191 F. 2d 613 (C. A. 5), cert. denied 343 U. S. 919.

mon issues. They argue that to confine the principle—to the protection of a multiemployer unit—would be to take a "mechanical, wooden approach" to the problem. They urge the logic of the *Buffalo Linen* case equally applies to this situation, as it affects the Teamsters.

As I see it, *Buffalo Linen,* among other things, adjures the Board to weigh the conflicting interests of employee and employer in determining to what extent the right to lock out may infringe upon the right to strike. I agree that a wooden, mechanical approach may not be used; the test, as I see it, is whether special circumstances favoring a suspension of business operations outweigh the statutory right to strike.

Whatever may the case with respect to the instant suspension agreement as it might have been directed toward preserving the integrity of a multiemployer unit, I see no special circumstances justifying its extension to cover, as it did here, single-unit Teamsters' disputes. I do not believe that the reasoning of *Buffalo Linen* was intended to cover, or should cover, cases of *common issues.* Farflung employers in the same industry have common issues; diverse employers in an area have common issues. To permit supportive lockouts over common issues would, in my opinion, be a serious and unwarranted restraint upon the right to strike.[62]

For these reasons, as indicated, I find the Respondents' suspension agreement to extend beyond the lawful limits of Section 8(a)(1) of the Act and, therefore, to constitute a violation of Section 8(a)(1).

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[62] I note that the Board refused to extend the *Buffalo Linen* principle to a situation wherein, although the unit throughout which the lockout was extended was a multiemployer unit, the reason for the lockout was something other than protection of the integrity of the unit. *Anchorage Business Association, Drug Store Unit,* 124 NLRB 662, 668-9.

In so finding, I do not adopt or use the contention made by General Counsel in asserted reliance on *Buffalo Linen*, that Respondents' actions were unlawful in view of their relative superiority—size-wise—over the unions involved. Even if this were part of the Supreme Court's reasoning—and I am sure that the Court was not merely citing an example of the type of situation which might arise rather than a factor upon which it would rely[63]—the facts in this record do not support the General Counsel's contention.

Respondents argue, finally, that, even if there was a suspension agreement, there was no violation of law absent implementation. Assuming no implementation (but see "The 1962 suspensions," *infra*), there was *communication*. All of the evidence which persuaded me that such an agreement existed,[64] with the possible exception of that relating to Mr. Dorris' memorandum to his superior, constituted evidence of publication of the fact as well. Clearly, implemented or not, a suspension agreement as described above, made known to employees, tends to inhibit them in the exercise of their Section 7 rights.

One other item deserves mention. I do not rely, in arriving either at the above conclusions or at the conclusions reached in "The 1962 suspensions," *infra*, upon the factor of strike insurance. Having given the matter careful consideration, I do not regard the existence of strike benefits for the employees—as persuasive one way or the other.

5. The 1962 suspensions.

The General Counsel alleges that, pursuant to their suspension pact, the Free Press and the News engaged in a number of suspensions of publication in violation of Section 8 (a) (1) and (3) of the Act. Alternatively, he urges

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[63] See *Buffalo Linen, supra*, page 96.

[64] See "The suspension agreement," *supra*.

that, even absent a suspension agreement, these suspensions constituted 8(a)(1) and (3) violations. The suspensions in question are the Free Press suspension of February 15, 1962 (see *Chron.* 11); the News suspension of April 12-14, 1962 (see *Chron.* 17); the News suspension of April 16-19, 1962 (see *Chron.* 19-21); and the Free Press suspension of May 8 and 9, 1962 (see *Chron.* 28).

I find that the Free Press suspended publication of its February 15, 1962, issue (which would have been printed February 14) pursuant to the suspension agreement which I have heretofore found to have been in existence. This however, is not dispositive of the matter. For, on two basic grounds, I perceive no violation of law in this failure to publish by the Free Press.

(1) The suspension arose out of an interruption of work at the News brought about by a "meeting" of paper and plate handlers. This meeting was the sixth of a series of such interruptions, at both the News and the Free Press, within a period of 8 days. The interruptions were the subject of a telegraphic protest, on behalf of both papers, by the Association on February 12. Moreover, it can be fairly inferred, from PPH international action on February 12 (*Chron.* 9), that the meetings were unauthorized if not unlawful. Finally, as I have found, the cause of the February 14 shutdown at the News was the paper and plate handlers' dissatisfaction with or efforts to influence the contract negotiations then being jointly conducted with the publishers.

If from no other viewpoint, Respondents were justified in taking their action to preserve the unit bargaining, in accordance with the *Buffalo Linen* principle.

(2) Finally, there was no loss of employment. I gather that the General Counsel would have me conclude that, even though no employment is immediately lost, a suspension of newspaper publication results in community

pressure on the striking union to end the strike. I do not deem it necessary to pass upon this "conclusion" as it might be affected by long-lasting periods of publication-suspension; in this instance, I do not find the nature and degree of the suspension, if it constitutes discrimination, to have a tendency to or to be likely to discourage union membership.[65]

For reason (1) given above, I find no violation in the May 8 and 9 suspension of the Free Press.

(As noted above, the General Counsel urges that these suspensions, as well as others, were effectuated pursuant to the suspension agreement which I have heretofore found unlawful; therefore, it might be argued, however they might be justified standing alone, they are unlawful as the fruit of an unlawful pact. The short answer to this is, to the extent that they resulted from the suspension agreement, it was from that part of the agreement which, if standing alone, I would have found to be lawful. I shall find no violation, as such, in these acts.)

Likewise, I find no violation with respect to the News' suspension of April 12-14, but only for reason (2) above; as far as this record reveals, there was no loss of employment or wages.

I reach a different result with respect to the News' suspension of April 16-19. For reasons set forth in "Concluding findings on the suspension agreement," *supra*, I find that the suspension of publication by the News during this period interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act; and that, in addition, the loss of employment occasioned by the second suspension, constituted discrimination which discouraged union membership.

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[65] *Publishers' Association of New York City, supra,* Intermediate Report, page 20, as approved by the Board on broader grounds.

(I find that the News took this action pursuant to the suspension agreement between Respondent and that, therefore, the suspension of April 16-19, 1962, constituted a violation of 8(a)(1) and 8(a)(3); but that, even if there were no proof of such agreement, the suspension would be unlawful on the part of the News alone.)

6. The double-masthead of April 16, 1962.

Counsel for the General Counsel urges that the News' publication of the double-masthead on April 15, 1962 (see *Chron.* 17) violated Section 8(a)(1) of the Act since it constituted an attempt to provoke a strike at the News, thus either avoiding the necessity of a lockout there or furnishing a pretext for such lockout.

The issuance of the double-masthead undoubtedly assisted, and was designed to assist, the Free Press, which was then beset by a Teamsters picket line; undoubtedly, also, it constituted the performance of struck work. Moreover, its preparation necessitated the crossing of a picket line by employees who were members of the picketing union.

On the other hand, Respondent News put forward a logical, non-union-connected, reason for, the event: the fact that Easter Sunday fell 1 week later—a newspaperless week in which merchants would anticipate substantial shopping. As for the anticipated reprisals to cross a picket line, the News had no more reason to believe that there would be "trouble" than there had been in connection with the 1957 double-mastheads (see *Chron.* 3).[66]

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[66] The witness Thiel testified that, sometime in 1960, Butz had conceded to him that the 1957 mastheads were designed to "trap" the union into extending its picket line to all newspapers, thus obviating the necessity for supportive lockouts. Butz, testifying, denied making the statement. Thiel's testimony did not have the ring of truth; in my opinion, the statements attributed to Butz were quite out of character with his dealings with unions, as displayed at this hearing. I credit the denial.

Except for lockout action, I know of no precedents for finding unlawful any action taken by one employer in support of a struck employer, and I find no violation here.

IV. The effect of the unfair labor practices upon commerce.

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy.

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and to take certain affirmative action in order to effectuate the policies of the Act.

Having found that Respondents violated Section 8(a)(1) by being parties to an agreement which unduly interferes with, restrains, and coerces employees in the exercise of their Section 7 rights, I shall recommend that they cease giving effect to any such agreement. Also, having found that, pursuant to such agreement, they discriminated with respect to the tenure of certain employees from April 16-19, 1962, inclusive, I shall recommend that, jointly and severally, they make these employees whole for the loss of employment suffered by them because of the discrimination, by payment to each of them of a sum of money equal to the amount he would have earned but for said loss of employment, less his net earnings during the period of such loss.[67] Backpay shall include interest at the rate of 6 percent per annum computed quarterly.

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[67] I have heretofore found that the discrimination occurred pursuant to the suspension agreement mentioned above; hence, the

As the unfair labor practices committed by Respondent are of a character striking at the roots of employee rights safeguarded by the Act, I shall also recommend that Respondents cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

Upon the basis of the foregoing factual findings and conclusions and upon the entire record in this case, I make the following:

Conclusions of Law.

1. The Free Press and the News are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the Association is their agent.

2. PPH, the Pressmen, the Photo-Engravers, the Stereotypers, the Mailers, the Teamsters, the Guild, the IBEW, the ITU, the Engineers, the Machinists, the Mechanics, the Building Service Employees, and the Carpenters are labor organizations within the meaning of the Act.

3. By discriminating in regard to the tenure of employment of certain employees from April 16, 1962, to April 19, 1962, inclusive, to inhibit the right of employees to strike, Respondents Free Press, News, and Association engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. By the foregoing conduct; and by entering into, maintaining, and enforcing an agreement whereunder, if either the Free Press or the News suffer a work stoppage because of employees refusal to work or because of a picket line (the sole limitations of which agreement are

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joint and several obligation. I have earlier indicated that I regarded the suspension of April 16-19 to have been violative of Section 8(a)(1) and (3) on the part of the Respondent News even if it had not been pursuant to the agreement; in such case, I would have recommended imposition of the backpay obligation on the News only.

that it does not apply to disputes and resolutions of which is outside the scope or authority of either publisher and that it does not apply to a dispute with a union which does not deal with both publishers), the other will suspend its own operations—Respondents have interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act, in violation of Section 8(a)(1) thereof.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

6. Except for the above, Respondents have not engaged in unfair labor practices as alleged in the complaint herein.

RECOMMENDED ORDER.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that

I. Knight Newspapers, Inc., publisher of the Detroit *Free Press,* and Evening News Association, publishers of the Detroit *News,* their officers, agents, successors, and assigns, shall:

A. Cease and desist from:

(1) Discouraging membership in any labor organization of their employees by discriminating in regard to tenure of employment.

(2) Entering into, maintaining, enforcing, or renewing any agreement or understanding whereunder, if either of them suffer a work stoppage because of employees' refusal to work or because of a picket line (the sole limitations of which agreement are that it does not apply to disputes the resolution of which is outside the scope of authority

of either publisher and that it does not apply to a dispute with a union which does not deal with both publishers), the other will suspend its own operations.

(3) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities.

B. Take the following affirmative action, which I find will effectuate the policies of the Act:

(1) Jointly and severally, with each other and with Detroit Newspaper Publishers Association, make whole those employees of Evening News Association who lost employment from April 16, 1962, to April 19, 1962, inclusive, for any loss of earnings suffered by reason of the discrimination against them, in the manner set forth in the section above entitled "The remedy."

(2) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, and personnel records and reports necessary to analyze the amount of backpay due.

(3) Each post at its plant in Detroit, Michigan, copies of its respective notice attached hereto as Appendices A and B.[68] Copies of such notice, to be furnished by

[68] If these Recommendations are adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Examiner" in each notice. If the Board's Order is enforced by a decree of the United States Court of Appeals, each notice will be further amended by the substitution of the words "A Decree of the United States Court of Appeals Enforcing an Order" for the words "A Decision and Order."

the Regional Director for the Seventh Region, shall, after being duly signed by an authorized representative of the respective Respondents, be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that such notices are not altered, defaced, or covered by any other material.

(4) Notify the Regional Director for the Seventh Region, in writing, within 20 days from the date of the receipt of this Intermediate Report what steps the Respondent has taken to comply herewith.[69]

II. Detroit Newspaper Publishers Association, its officers, agents, successors, and assigns, shall:

A. Cease and desist from:

(1) Discouraging membership in any labor organization of its members' employees by discriminating in regard to tenure of employment.

(2) Entering into, maintaining, enforcing, or renewing any agreement or understanding whereunder, if either of its members suffer a work stoppage because of employees' refusal to work or because of a picket line (the sole limitations of which agreement are that it does not apply to disputes the resolution of which is outside the scope or authority of either member and that it does not apply to a dispute with a union which does not deal with both members), the other will suspend its own operations.

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[69] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Seventh Region, in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

(3) In any other manner, interfering with, restraining, or coercing its members' employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities.

B. Take the following affirmative action, which I find will effectuate the policies of the Act:

(1) Jointly and severally with Knight Newspapers, Inc., and Evening News Association, make whole those employees of Evening News Association who lost employment from April 16, 1962, to April 19, 1962, inclusive, for any loss of earnings suffered by reason of the discrimination against them, in the manner set forth in the section above entitled "The Remedy."

(2) Notify the Regional Director for the Seventh Region, in writing, within 20 days from the date of the receipt of this Intermediate Report what steps the Respondent has taken to comply herewith.[70]

It is further recommended that the complaint be dismissed insofar as it alleges that Respondents engaged in other conduct (the *Free Press* suspension of operations on February 14, 1962; the *News* suspension of April 12-14, 1962; the "double-masthead" of April 15, 1962; and the *Free Press* suspension of May 8 and 9, 1962) violative of the National Labor Relations Act.

Dated at Washington, D. C.

Harold X. Summers
Trial Examiner

[70] If the Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Seventh Region, in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX "C".

Final Order of the Court.

(Caption omitted.)

Before: Cecil and O'Sullivan, Circuit Judges, and Kent, District Judge.

On petition to review and set aside and on cross petition for enforcement of an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the order of the Board be and it is vacated and enforcement is denied.

No costs awarded. Rule 23 (4).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

Issued as Mandate: August 3, 1965.

APPENDIX "D"

Order Denying Rehearing.

(Caption omitted.)

Before: Cecil and O'Sullivan, Circuit Judges, and Kent, District Judge.

This cause is before the Court upon petition of the National Labor Relations Board for rehearing of the decision and order of the Court denying the petitioner's motion to remand the case to the Board for reconsideration in the light of *The American Ship Building Company v. N. L. R. B.*, 380 U. S. 300. It is now claimed that the intervening decision of the Supreme Court, in *United Mine Workers of America v. James M. Pennington*, 381 U. S. (33 U. S. Law Week 4520, June 7, 1965) supports the Board's contention that the motion to remand should have been sustained.

Upon consideration of the petition to rehear in the light of *United Mine Workers of America v. James M. Pennington*, supra, it is ordered that the petition to rehear be and it is hereby denied.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

APPENDIX "E".

Order Extending Time to File Petition for Writ of Certiorari.

(Caption omitted.)

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 14, 1965.

/s/ Potter Stewart,
Associate Justice of the Supreme Court of the United States.

Dated this 18th day of August, 1965.

APPENDIX "F".

Statutes Involved.

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Sec. 151 et seq.):

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 663

NEWSPAPER DRIVERS & HANDLERS LOCAL UNION NO. 372, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, IND., PETITIONER

v.

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, ET AL., AND THE NATIONAL LABOR RELATION BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Petitioner ("the Union"), the charging party before the Board, seeks review of the judgment of the court below denying enforcement of an unfair labor

practice order which the Board had issued against the Detroit News.[1]

The relevant facts, as found by the Board (Pet. 23-29, 43-53), may be summarized as follows:

1. The Union represents, in separate bargaining units, certain of the employees of the News and of the Detroit Free Press. In October 1961, the Union notified each paper—which negotiated through the Detroit Newspaper Publishers Association—of its desire to revise the contract that was due to expire in November. Between the end of October 1961 and March 1962, the Union had a series of bargaining meetings with each newspaper separately. On April 6, the Union presented a revised proposal to the Free Press and advised that strike action would be recommended on April 11 if a satisfactory offer was not received by that date.

2. The last meeting between the News and the Union had been on March 22, when the Union had agreed to submit revised contract proposals. On April

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[1] The Union was a party to the proceedings in the court below, having petitioned to review those parts of the Board's order adverse to it. The Board, although finding that the News had violated the Act in locking out its employees as described *infra*, dismissed the complaint insofar as it charged that the Association and the Detroit Free Press were responsible for this unfair labor practice and that the agreement between the Free Press and the News by which the latter agreed to suspend publication if the Union struck the former (see text, p. 3) violated the Act. The Union sought review of this dismissal, and thus has standing to petition for certiorari. *International Union of Mine, Mill and Smelter Workers* v. *Eager-Picher Mining and Smelting Co.*, 325 U.S. 335, 338-339.

9 and 10, officials of the News met with officials of the Free Press. These officials found that ten of the eighteen issues in dispute between the Free Press and the Union also were of interest to the News. The News urged the Free Press not to capitulate on three of these issues under any circumstances, and promised that, if the Union struck the Free Press over those issues, it would support the Free Press and would not publish. The two papers further agreed that they would not inform the Union that a strike against one would be treated as a strike against both, or that the News would not publish if there were a strike at the Free Press.

3. On April 11, the Free Press gave the Union its "last best offer," which the latter rejected. A strike ensued. On April 12, the Union submitted its revised proposals to the News. Pursuant to its agreement with the Free Press, the News ceased publication on that day, but did not lay off any of its employees until April 16. On April 19, the Free Press and the Union agreed to new contract terms, the Union ended the strike against the Fress Press and the News ended its lockout.

On these facts, the Board concluded that the News locked out its employees from April 16 through 19 because of the strike against the Free Press; that since the two papers did not bargain in a multi-employer unit, the lockout was not privileged under the *Buffalo Linen* doctrine [2] which sanctions the use of a lockout

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[2] *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87.

to preserve the integrity of a multi-employer unit; and that accordingly the News abridged the rights of its employees in violation of Sections 8(a)(1) and (3) of the Act.[3] The Board ordered the News to cease and desist from the unfair labor practices found, and to reimburse the employees who were unlawfully locked out for any loss of pay they may have suffered. (Pet. 28-31.)

The newspapers and the Union (see n. 1, *supra*) filed petitions to review the Board's order and the Board cross-petitioned for enforcement. While the case was under submission, this Court held, in *American Ship Building Company* v. *National Labor Relations Board*, 380 U.S. 300, that an employer in a single bargaining unit did not violate the Act by temporarily laying off his employees, after an impasse in the bargaining had been reached, for the purpose of securing his contract terms. Viewing the present case as governed by that holding, the court below found that the lockout by the News was privileged and set aside the Board's order (Pet. 13-20). The Board filed a petition for rehearing, urging that the case should be remanded for reconsideration in the light of *American Ship* and the subsequent decision in *United Mine Workers* v. *Pennington*, 381 U.S. 657. The court below denied the petition (Pet. 86).

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[3] The Board found a violation not only with respect to the employees in the unit represented by the Union, against whom the lockout was specifically directed, but also with respect to the other employees who were laid off in consequence of the unlawful lockout against the unit employees (Pet. 28-29).

The Board decided the case on the theory that a lockout, even though motivated by economic considerations, was barred by the Act, except where it was used to preserve a multi-employer unit or to safeguard a single employer against unusual operating hazards. In *American Ship*, this Court rejected that theory, holding that *after* an impasse in the negotiations had been reached, a single employer could use a lockout to advance his bargaining position. The Court, however, did not decide whether a lockout *before* impasse is permissible (380 U.S. at 308). Moreover, since only a single employer was involved, it had no occasion to pass on the further question whether an employer in one bargaining unit could lock out to advance the position of another employer in a different bargaining unit. And, in the subsequent *Pennington* case, the Court indicated that it was contrary to national labor policy for a union and an employer in one bargaining unit to bargain respecting conditions in another unit.

Whether the factors of lack of impasse and different bargaining unit, either singly or in conjunction,[4] are enough to warrant a different result than that reached in *American Ship* presents difficult problems of law and policy which should be passed on, in the first instance, by the Board. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428. Accordingly, the court below, instead

[4] Both factors are present here, since the News locked out before an impasse had been reached in its negotiations with the Union, and did so in support of the bargaining position of Free Press, which was in a separate unit.

of initially deciding the issue itself, should have remanded the case to the Board for reconsideration in the light of this Court's intervening decisions—as two other courts of appeals did with lockout cases which the Board had decided before *American Ship*. *National Labor Relations Board* v. *American Stores Packing Co.* (C.A. 10), September 16, 1965, 60 LRRM 2128; *Simplot Co.* v. *National Labor Relations Board* (C.A. 9), June 29, 1965, 60 LRRM 2096. See also *Amalgamated Meat Cutters* v. *National Labor Relations Board (Kroger Co.)* (C.A. D.C.), July 13, 1965, 60 LRRM 2032, in which the court remanded to consider the effect of *National Labor Relations Board* v. *Brown*, 380 U.S. 278. But cf. *Body & Tank Corp.* v. *National Labor Relations Board* (C.A. 2), April 21, 1965, 59 LRRM 2123.

For these reasons, the Board does not oppose the grant of the petition. It suggests, however, that, since it has not considered the substantive issues in the light of *American Ship* and *Pennington*, the Court should summarily vacate the judgment of the court of appeals and remand the case to the Board for reconsideration. See *Federal Trade Commission* v. *Texaco, Inc.*, 381 U.S. 739; Pet. 12.

Respectfully submitted.

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NOVEMBER 1965.

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No. 663

IN THE

Supreme Court of the United States

October Term, 1965

NEWSPAPER DRIVERS & HANDLERS LOCAL UNION NO. 372, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, IND.,
Petitioner

-vs-

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE EVENING NEWS ASSOCIATION, Owner and Publisher of the Detroit News, KNIGHT NEWSPAPERS, INC., Owner and Publisher of The Detroit Free Press, and NATIONAL LABOR RELATIONS BOARD,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE INLAND PRESS, DETROIT, MICHIGAN

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IN THE

Supreme Court of the United States

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No. 663

NEWSPAPER DRIVERS & HANDLERS LOCAL UNION NO. 372, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, IND.,
Petitioner

-vs-

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE EVENING NEWS ASSOCIATION, Owner and Publisher of the Detroit News, KNIGHT NEWSPAPERS, INC., Owner and Publisher of The Detroit Free Press, and NATIONAL LABOR RELATIONS BOARD,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

ON BEHALF OF RESPONDENTS, DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE EVENING NEWS ASSOCIATION AND KNIGHT NEWSPAPERS, INC.

CITATIONS TO OPINIONS BELOW

The Decision and Order of the National Labor Relations Board are reported in 145 NLRB 996. The Opinion of the Court of Appeals for the Sixth Circuit, vacating the Board's Order, denying enforcement of its Order and dismissing the petition of Newspaper Drivers & Handlers Local Union No. 372 (petitioner herein) is reported at 346 F. 2d 527.

JURISDICTION

Petitioner's statement of this Court's jurisdiction to review is accepted except that it is noted that petitioner did not join with the Board in petitioning the Court below for a rehearing, nor has the Board seen fit to join in this Petition or file a separate petition for certiorari.

QUESTIONS INVOLVED

In its statement of "Questions Presented", petitioner poses two questions, each of which is based on a false assumption.

Question 1 inquires whether an employer violates Section 8(a)(1) or (3) of the Act[1] by locking out its employees prior to a bargaining impasse. No such issue or question was involved or presented in this case. The Trial Examiner and the Board made no finding that a bargaining impasse did not exist. The question was not posed to the Court below. The record clearly demonstrates that an impasse did in fact exist prior to the lockout.

Question 2 inquires whether an employer violates Section (8)(a)(1) and (3) of the Act when it locks out its employees to bring pressure upon another's employees who are on strike. No such issue or question was involved or presented in this case. The lockout finally resorted to by the News[2] was in support of *its own position,* both employers being confronted with identical demands by the same union.

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[1]Refers to sections of the National Labor Relations Act as amended, 61 Stat 140, 20 U.S.C. §158(a) (1) and (3) (1958 ed.). Set forth in full in petitioner's Appendix "F", p. 88.

[2]Respondent, The Evening News Association, is referred to herein as "the News", Respondent, Knight Newspapers, Inc., as "the Free Press", and Respondent, Detroit Newspaper Publishers Association, as "the Association".

Question 3 was posed in the Court below by petitioner. The Board opposed petitioner on this question. Since the Court below held that the lockout was not in violation of the Act it dismissed petitioner's appeal on this question.

The question presented is whether or not the Court below, in finding that a three-day temporary layoff by the News did not violate Section 8(a)(1) or (3) of the Act in the circumstances of this case, violated any principle announced in *American Ship Building Co.* v. *Labor Board*, 380 U.S. 300, and *Labor Board* v. *Brown*, 380 U.S. 278.

The decision below presents no novel or important questions of legal principle warranting review by this Court nor does it involve any conflict with any decision of this Court or the decisions of the Courts of Appeal of other circuits. Because of the particular nature of bargaining by the Detroit newspapers, the decision can have no impact beyond its context. The fact that the decision below does not present an important question of federal law in the Government's view is emphasized by the Board's failure to petition for certiorari as was its right.[3]

STATUTES INVOLVED

In addition to the statutory provisions cited by petitioner are those cited by the Court in *American Ship Building*, 380 U.S. at 315, i.e., 29 U.S.C. §§158 (d)(4), 173(c), 176 and 178. These are printed in pertinent part in Appendix A, infra, p. 20.

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[3]Petitioner states (Pet. 3) that "the Board will support, *with some limitations*, the granting of this petition". We can only speculate as to those "limitations" but the fact remains that the Board did not see fit to initiate this review.

STATEMENT OF THE CASE

Petitioner's Statement cannot be accepted in any consideration of its Petition. Not only are there major misstatements of fact but much is ignored without which there can be no fair understanding of what the Court is asked to review. In view of the extensive record below,[4] it would unduly prolong this brief to detail the events of 1961-1962 which culminated in the strike at the Free Press and the ensuing suspension and lockout by the News. We therefore limit ourselves to a brief review of what occurred, what has been misstated and what has been ignored.

This was a Section 8(a)(1) and (3) charge, involving alleged misconduct by respondents during the course of bargaining in 1961-1962 with 14 unions for 21 different contracts. Good faith bargaining was conceded by the Board's failure to charge a refusal to bargain under Section 8(a)(5).

We start with the major premise, ignored by petitioner, that the Board expressly found no allegation or evidence of any interference, restraint or coercion of respondents' employees independent of that which might be inferred from the temporary layoff or lockout by the News from April 16-19, 1962. There was no evidence or finding of a design to destroy or frustrate collective bargaining, no anti-union animus and no purpose to discipline employees for adhering to their union's demands (Pet. App. A 17, 18).[5] It was

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[4]The record comprises five printed volumes of transcript and exhibits. The hearings commenced September 17, 1962 and were not concluded until November 2, 1962. More than twenty witnesses testified as to the Teamster strike and lockout.

[5]Pet. App. A refers to the appendix attached to the petition containing the opinion of the Court below, App. B to the appendix containing the Board's decision and intermediate report.

undisputed that "The only question between the News and the Teamsters concerned the terms of their collective bargaining agreement" (Pet. App. A 18). In short, like *American Ship Building,* the lockout in this case, to be held illegal, must carry its own indicia of intent or must be so inherently prejudicial to union interests as to be a violation of the Act.

Bargaining by respondents with the Teamsters[6] commenced prior to expiration of the old contracts on November 15, 1961 and continued, at least with the Free Press, for six months thereafter without success until the Teamsters, on April 11, 1962, struck the Free Presss after rejecting its "latest best offer" (Pet. App. A 14-15, B 47-49; R IV 630a-631a; R V 995a-999a).[7] From early January, 1962 until after the Free Press strike, the Teamsters, despite repeated requests, refused (with the exception of one abortive session) to bargain with the News (Pet. App. A 14, B 15, 47, Fn. 17; R V 999a).

A major misstatement of fact by petitioner is that it was free to strike the Free Press but not the News—allegedly because of a clause in the old contract which had expired November 15, 1961 (Pet. 4). In other words, petitioner claims that the News was not threatened with a strike when it locked out its employees (Pet. 11). Despite a similar contention below, no such finding was made by the Trial Examiner, the Board or the Court.

This error is best demonstrated by the Teamsters' own actions. Prior to the Board proceedings no mention was

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[6]Petitioner, Newspaper Drivers & Handlers Local Union No. 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., is sometimes referred to herein as "the Teamsters".

[7]R IV and R V refer to the volume number of the printed record and 630a-631a, 995a-999a to the page number of those volumes.

ever made of such a contract commitment by the Teamsters. Instead, before expiration of the old contracts, the Teamsters gave requisite notice to state and federal mediation to clear the decks for strike action against both the News and Free Press pursuant to Section 8(d)(2) and (4) of the Act (R V 1005a). Subsequently, in November, 1961, petitioner flatly rejected a request by both the Free Press and the News for an extension of the old contracts, subject to five-day termination notice by either party (Pet. App. B 47; R III 446a-448a; V 1002a; I 49a). Following this, in December, 1961, Teamsters gave their negotiating committees strike authority for both papers (by an overwhelming vote in the case of the News), which fact was communicated to respondents (Pet. App. B 47 and Fn. 18).[8]

Lastly, when Mr. Hoffa took charge of negotiations in April 1962, he told the News to be present on a standby basis at a Free Press meeting "*because the issues at the News would have to be settled or they'd be on strike also*" (Pet. App. A 15, 16, B 51 and Fn. 20). These issues were not settled prior to the lockout. In view of the above undisputed facts it is idle to say that the News was not threatened with a strike prior to its lockout. The fact is that it was under constant threat of strike without even the limited assurances given the employer in *American Ship Building*.

Another major misstatement is that the News locked out its employees on April 16, 1962 prior to any impasse in bargaining (Pet. 7) whereas an impasse had concededly been reached at the Free Press prior to the Teamster strike on April 11, 1962 (Pet. 4). This claim, made without record reference, will not bear analysis. No such finding was made

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[8]Fn. 18 refers to the footnote on page 47 of Appendix B to the Petition.

by the Trial Examiner or the Board. The record is to the contrary. If there was an impasse at the Free Press the same was true of the News.

Thus, it is undisputed that the Free Press, under strike ultimatum, offered the Teamsters its "latest best offer" on April 11, which was summarily rejected by the membership and a picket line established (Pet. App. A 14, B 49). Prior to this offer the publishers had consulted together, as was their practice when demands made were of common interest (Pet. App. B 69). Of the eighteen Teamster demands then remaining, there were three of such basic importance to both papers that the News agreed to support the Free Press if the latter were struck because it did not agree to these demands. (Pet. App. A 15, B 48; R IH 579a-586a; IV 644a-646a; V1139a-1140a). Petitioner concedes that its demands created an impasse at the Free Press (Pet. 4).

On April 12, 1962, the News received a revised set of proposals by the Teamsters (the first since December 1961). (Pet. App. B 47, Fn. 17, 49; R IV 636a). These proposals contained at least ten demands which had also been made of the Free Press (R V 1101a; Pet. App. B 48). Included were the identical three basic demands. This was prior to any suspension of publication or lockout by the News. At this point Mr. Hoffa took charge of negotiations and scheduled meetings with both papers, informing the News that if the issues were not resolved as to them they'd be on strike also (Pet. App. B 51 and Fn. 20; R IV 807a-808a).

Meetings with the Free Press and News on April 13 and 14 did not resolve these issues (Pet. App. B 51). At the conclusion of the News meeting, Hoffa announced that he would take the "company's last proposal" (a proposal made

four months before in December, 1961) to the membership despite protests by the News that this was not their last or best proposal and that they were willing to continue negotiations. It is undisputed that Hoffa's reply was to the effect that "regardless of whether it is the best proposal . . . this is your final best offer and it is going to be submitted to the union" (R IV 636a). Since the Teamsters had already rejected an even better offer from the Free Press, similar rejection of this old offer was a foregone conclusion. No further meetings were scheduled (R III 501a) and Mr. Hoffa left town. On April 16, 1962, confronted with this situation, the News temporarily laid off its employees (Pet. App. B 50-51).

In light of the above, with substantial economic issues unresolved, a strike threatened and a refusal by the Teamsters to continue the bargaining, it is clear that a bargaining impasse had been reached to the same extent at the News as at the Free Press and to the same extent as in *American Ship Building*, 380 U.S. at 303.

A further misstatement, and one corollary to the above, is that following the above meetings, negotiations were "recessed" until April 18, 1962, (Pet. 5), prior to which date the News locked out its employees. There was no "recess." As noted above, Mr. Hoffa refused to continue negotiations and no further meetings were scheduled after April 14, 1962. What did take place is undisputed. On the day of the layoff (April 16), respondents proposed to Hoffa mediation by *a third party of his choice* (R V 1000a). The next day they agreed to joint mediation (R V 1001a) and mediation accordingly took place on April 18 with then Police Commissioner Edwards (now Judge of the Sixth Circuit Court of Appeals) acting as mediator (Pet. App. A 16,

B 52). This resulted in an agreement ending the strike and lockout on April 19, 1962 (Pet. App. B 52).

The newspaper business and its labor relations, particularly in Detroit, are peculiar in nature, bearing no resemblance to the modern industrial type union, negotiating for all employees of a given employer. The Detroit newspaper business has been organized on a craft union basis for many years (Pet. App. B 39; R V 1112a). Recognition of most of these unions antedated the Wagner Act. These craft locals represent skilled employees performing similar functions at both papers (Pet. App. B 39, 40). The Teamsters are one such union, representing circulation department employees. Respondents have recognized the Teamsters for over twenty years (Pet. App. A 18, B 66, 67). In fact, the two full-time local officers who controlled negotiations at both papers had held office since 1938 and 1945 (R II 247a, 316a).

Bargaining with 14 unions for 21 different contracts (Pet. App. B 39), all commencing at or about the same time and continuing concurrently until agreement is reached with each union (Pet. App. B 68; R V 1112a), is not a simple matter. Of necessity, bargaining with one local representing two groups of employees at both papers is interrelated and there is also a bargaining relationship between the various locals—particularly as regards basic economic demands. Thus, in 1961-1962, prior to the Teamster strike, agreement had been reached with several crafts establishing a wage increase pattern. One of the three basic demands by the Teamsters which caused the Free Press strike and the News lockout was for a wage increase in excess of that pattern (Pet. App. B 48). The effect of a concession to such a demand on current and future negotiations needs no elaboration.

Because of the complexity of this kind of bargaining and the necessity for a united front on common issues, the publishers had many years before formed the Association to handle their labor negotiations (Pet. App. A 14, B 35, 51, 52, 63, Fn. 36; R III 410a-411a, 414a-419a). All contracts were negotiated at the Association's offices with the Association's Secretary present (R III 414a-419a). In the case of every craft union (except the Teamsters) representing employees performing similar functions at both papers, a "direct" representative of both papers attended bargaining sessions (R III 410a-411a, 414a-419a). In the Teamster's case, a "direct" representative of only one paper and the Association Secretary attended (Pet. App. B 68). But each paper was advised of the other's progress and they consulted with one another on common issues (Pet. App. A 15, B 25, Fn. 5, 69). Historically, the basic economic terms of both contracts with the Teamsters had been substantially identical (Pet. App. B 71).

This difference in bargaining with the Teamsters was pivotal to the Board's finding that all such crafts, excepting the Teamsters, bargained on a multi-employer basis in the traditional sense while Teamsters did not (Pet. App. A 15, B 76-78). It was likewise critical to the Board's finding that, when these other craft unions employed "whipsaw" tactics, the publishers were free to support one another, while they were literally defenseless to resist similar tactics by the Teamsters (Pet. App. B 76-78).

With demands made of the News identical to those which caused the strike at the Free Press, for the News to have continued publication would have been fatal to its bargaining position as well as that of the Free Press. To the normal leverage of any strike would have been added the far greater

pressure on the Free Press of business lost, perhaps forever, to the News. Concession by the Free Press would have been accompanied by an ultimatum and strike at the News, with the same added leverage in its case of a resumption of publication by the Free Press.[9] This, of course, is a "whipsaw" strike. Two competing companies bargaining with a common union over common issues, but rather than a common strike, selective, consecutive shutdowns used by the union to gain concessions first from one employer, then the other. Participation by the News in the first stage of the Teamsters' whipsaw would have been participation in a strike against itself.

In a belated effort to bring itself within its interpretation of *United Mine Workers* v. *Pennington*, 381 U.S. 657, petitioner makes the erroneous statement that the News' lockout was for the purpose of "determin(ing) the wages and working conditions of employees of the Free Press" (Pet. 10) and that "the News enmeshed both itself and its employees in the dispute between the Free Press and Local 372 in an effort to influence the outcome of that dispute." (Pet. 11). This totally neglects the fact that Local 372 had already enmeshed the News and its employees in the same dispute by reason of the identical demands made of both papers, and the further fact that the News had received an ultimatum from Mr. Hoffa prior to its lockout, as had the Free Press prior to its strike.

As the Board found, "the News considered three (issues) as being vital to *its bargaining* and urged the Free Press to maintain its position on these under all circum-

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[9] *Clune* v. *Publishers Ass'n. of New York City*, 214 F Supp. 520, 523 (DSD NY, 1963), aff'd. per curiam 314 Fed. 2d 343 (CA2 1963).

stances" (Pet. App. A 15, B 25).[10] It is undisputed, as the Court below found, that the only question between the News and the Teamsters concerned the terms of their collective bargaining agreement (Pet. App. A 18). Hence, when the News laid off its employees it was concerned with its own bargaining position and the obvious effect which a concession by the Free Press would have on that position. Nothing more.

ARGUMENT

As has been seen, the major reasons advanced for granting the writ are three: (1) the News locked out its employees prior to an impasse in bargaining; (2) the purpose of the lockout was to bring pressure upon the striking Free Press employees who bargained separately, and (3) there was no strike threat at the News because the Teamsters were bound by contract not to strike. If the basic premise for each is false then the reasons, if any, for granting the writ disappear.

The first premise is that an impasse did not exist at the News. The presence or absence of an impasse is an afterthought. It is a studied effort by petitioner to limit the principles enunciated in *American Ship Building* to its precise facts. Put more bluntly, it seeks to label as a *per se* violation of the Act any lockout occurring prior to an impasse in bargaining (Pet. App. A 17, 19). The Board nowhere found that there was not an impasse. No record reference is cited for petitioner's flat statement that there was no im-

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[10]As the Trial Examiner put it (App. B 48): "They (the News and Free Press) concluded, looking at the '18 issues remaining' between the Free Press and the Teamsters, that 10 were 'joint'—i.e., *of interest to the News in its negotiations as well.*"

passe at the News. It concedes that one existed at the Free Press. If this be so, then, as we have demonstrated, there was also an impasse at the News.

However, even if it be assumed that there was no impasse, it is clear from *American Ship Building* and *Brown* that the Court did not intend merely to create another limited exception to the Board's *per se* approach to lockouts. If it did then much of what was there said lacks any meaning.[11] The context of this case is sufficient to demonstrate that (Pet. App. A 20).

Compared with *American Ship Building*, there is, in the extensive record below, an equal lack of independent evidence of anti-union motivation or of intent to interfere with employee rights. There was no refusal to bargain charge under Section 8(a)(5). The temporary lockout was finally resorted to only after six months of negotiation had failed to resolve the basic dispute between petitioner and respondents. Even then its purpose was not to force acceptance of respondents' demands but to resist petitioner's demands,

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[11]As an example the Court in *Brown*, 380 U.S. at 283 and *American Ship Building*, 380 U.S. at 306, cited approvingly *Labor Board* v. *Dalton Brick & Tile Corp.*, 301 F. 2d 886. There was no bargaining impasse at the time of the lockout in that case. As the Court below correctly noted (Pet. App. A 17):

> "While in *American Ship Building* there was an impasse in the negotiations between the employer and the union, we do not think the teaching of that case merely adds another exception to the Board's category of permissible lockouts."

If the lockout is to be *per se* illegal whenever an impasse has not been reached (as petitioner contends) then the broad principles set forth in *American Ship Building* may be easily circumvented by a union's refusal to bargain (as in this case) or by a pretense of bargaining—all backed by authority to strike at a time most advantageous to the union.

which were in excess of increases already granted and which, in respondents' opinion, threatened effective control of their entire distribution system. The News did not continue the lockout until the necessary concessions had been made by the union as in *American Ship Building*. Instead, on the very first day of the layoff, they agreed to joint mediation of the dispute by a third person of the Teamsters' choice.

Relying on *American Ship Building's* holding that to establish a violation of Section 8(a)(1),

> "It must be shown that the employer has interfered with, restrained or coerced employees in the exercise of some right protected by Sec. 7 of the Act" (Pet. App. A 17),

the Court below emphasized that in this case (Pet. App. A 18),

> "... 'there is no allegation that the employer used the lockout in the service of designs inimical to the process of collective bargaining.' . . . There is no finding that the News was hostile to the Teamsters, or that it in any way attempted to interfere with the Teamsters' right to collective bargaining, or that the layoff was designed to discipline the employees for adhering to its union demands. Nor would the facts support such a finding. The News as well as the Free Press had a long record of dealing with the Teamsters. There was no disposition manifested to refuse to bargain with the Teamsters or to discourage membership in its union. Nor was there any animus shown toward the organization of the Teamsters or any of its members. The only question between the News and the Teamsters concerned the terms of the collective bargaining agreement."

The Court below further referred to *American Ship Building's* holding that to support a violation of Sec. 8(a)(3),

the Board must find ". . . 'an intention to discourage union membership or otherwise discriminate against the union . . . a desire to discourage membership in the union as distinguished from a desire to affect the outcome of the particular negotiations in which he was involved'." (Pet. App. A 18)

Relating the above to this case, the Court below correctly concluded (Pet. App. A 19):

> "What the (Supreme) Court said about the lack of evidence and findings (in *American Ship Building*) is eqally true in the case at bar . . . ."

Throughout the 1961-1962 bargaining the Teamsters were the aggressors. It was their demands (not the publishers') for contract improvements (in excess of those agreed to by other crafts) which provoked first the ultimatum, then the impasse and strike at the Free Press, despite repeated concessions by the latter (R I 49a-51a, III 464a-465a, 470a-471a, 566a-579a, 588a-593a, V 1108a-1012a, 1126a-1130a, 1131a, 1132a-1137a). It was the Teamsters who voted overwhelmingly to strike both papers and flatly refused the publishers' offers to extend the old contracts. It was the Teamsters who concededly refused to bargain with the News for over almost three months. It was Mr. Hoffa who told the News that all issues would have to be settled or they'd be on strike also. And it was he who terminated the negotiations the night of April 14, 1962 with the avowed purpose of taking a four-month old proposal (which resolved none of these issues) to the membership despite the News' protest that this was neither its last nor best offer and that it was willing to continue negotiations.

Nor did the News lockout immediately after the Free Press strike. Instead, to avoid the whipsaw, it suspended publication but paid its employees in full (Pet. App. A 15).

This the Board said it could legitimately do. It resorted to the lockout only after Mr. Hoffa terminated negotiations as above described. The lockout was a three-day temporary layoff with no effort to publish or operate with permanent or temporary replacements.[12]

This was not a case, such as those cited by petitioner, or other cases, where the employer used the lockout as an "offensive" weapon to force acceptance of his demands.[13] (Indeed, Mr. Hoffa would not even permit the News to formulate its final proposals.) Instead, on the first day of the layoff the publishers offered to accept mediation by a *third party of Mr. Hoffa's choice.*

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[12]*American Ship Building,* 380 U.S. at 308, footnote 8.

[13]*Labor Board* v. *American Stores Packing Co.,* 58 LRRM 2635 (CA 10), and the Order remanding that case for reconsideration by the Board (CA 10, March 15, 1965), cited by petitioner (Pet. 8, fn. 5), have no relevancy. There, a refusal to bargain charge was sustained and originally enforced by the 10th Circuit where the employer, at the first bargaining session after the old contract expired, announced that there would be no bargaining except on the employer's proposals and remarked that the union could sit there "until hell freezes over" before the employer would agree to any union proposals. Despite this, the 10th Circuit remanded the case to the Board on petition for rehearing to reconsider it in the light of *American Ship Building. Simplot Co.* v. *Labor Board,* 60 LRRM 2096 (CA 9, June 29, 1965), cited by petitioner (Pet. 8, 9, fn. 5) is equally irrelevant. There, the 9th Circuit also remanded the case for reconsideration in the light of *American Ship Building.* In that case (145 NLRB 171), unlike this, the Board had found independent evidence of anti-union motivation and that a lockout had been threatened to undermine the union. Nor was the lockout in this case used as an "offensive" weapon to force acceptance of the employer's demands in the face of union assurance that there would be no strike, as in *Utah Plumbing & Heating Contractors Assn.* v. *Labor Board,* 294 F. 2d 165 (CA 10, 1961), or resorted to when there was no threat of strike as in *Quaker State Oil Refining Co.* v. *Labor Board,* 270 F. 2d 40 (CA 3, 1959).

The second premise, i.e., that the lockout's purpose was to affect Free Press bargaining, is equally faulty. It is a studied effort to gain some support somehow from *Pennington*, cited, 381 U.S. 657. Again, the Board (but not petitioner) made the same argument to the Court below on its petition for rehearing. It was denied (Pet. App. B 86). We find no relevancy in *Pennington*. It was an antitrust case in which the United Mine Workers and certain employers reached beyond their bargain to impose terms on others, who did not participate, with the purpose and effect of driving them out of business. In support of its finding the Court stated that a labor union forfeited its antitrust exemption when it and an employer sought to bargain about wages, hours and working conditions of other bargaining units. 381 U.S. at 666, 668.

By contrast, the News was concerned with *its* bargain not that of the Free Press except to the extent that the latter bargain might influence its own ultimate contract. The Court below and the Board itself so found, stating that the News' concern was with *its own bargaining position* (Pet. App. A 15, 18, B 25, 48). To assert, as petitioner does (Pet. 11), that the decision below "confers upon employers the right to spread industrial strife beyond the confines of a primary dispute whenever they deem it in their bargaining interest to do so," is beyond belief. The decision below was made in the context of *this* case where the identical dispute and the same "industrial strife" existed at both papers. One had been struck and the other threatened with a strike over the same dispute. How the News' layoff under these circumstances served to "spread" industrial strife is beyond us.

The third premise, i.e., that the Teamsters were bound by contract not to strike the News, was at no time supported

by the Board. It is completely false as has been demonstrated in detail in the preceding Statement. This afterthought by the Teamsters is totally inconsistent with their actual conduct of the 1961-1962 negotiations. Their refusal to extend the old contract, their overwhelming vote of strike authority, and Mr. Hoffa's threat of a strike on the eve of the lockout belie any claim that they were somehow bound not to strike the News by virtue of an old contract which they had allowed to expire many months before.

We have extended this brief beyond the usual limits of a brief in opposition because of the peculiar nature of this particular case. We feel that a fair consideration of the petition requires some statement of the case other than a series of flat assertions, without record reference, such as characterize the Petition. The fact is that bargaining in the newspaper business, and particularly in Detroit, is such that it cannot be related to normal industrial bargaining. The claim that the decision below will have far reaching consequences is absurd. The large automobile manufacturers, whose bargaining is referred to, have never engaged in the type of bargaining which characterize respondents' negotiations. They are not organized on a craft basis, they are not closely allied, they have no bargaining association and they have not historically taken a common stand as have respondents with the several craft locals representing employees of both. Nor was this an *ad hoc* alliance, temporarily entered into for the purpose of influencing this particular bargain. It was an historic fact well known to all unions with which respondents dealt.

CONCLUSION

The decision of the lower Court correctly applied the principles of *American Ship Building* and *Brown* to the facts of this particular case. Its decision therefore presents no novel or important question of legal principle warranting review by this Court. It involves only the application of settled principle to the facts of this particular case. This is implicit in the Board's failure to petition for review, as it had the right to do. Because of the peculiarities of bargaining in the newspaper industry (and more particularly Detroit) the decision below can have no widespread implications, nor does it conflict with any decisions of other Courts of Appeal. Accordingly, no ground for review by this Court exists.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 10, 1965.

APPENDIX "A"

61 Stat. 140, 29 U.S.C. §158(d)(4) [in pertinent part]:

". . . Provided, that where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall thereafter terminate or modify such contract, unless the party desiring such termination or modification—

* * *

"(4) continues in full force and effect, without resorting *to strike or lockout,* all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:"

61 Stat. 153, 29 U.S.C. §173(c) [in pertinent part]"

"If the Director of Mediation Service is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort *to strike, lock-out,* or other coercion."

61 Stat. 155, 29 U.S.C. §176 [in pertinent part]:

"Whenever in the opinion of the President of the United States, a threatened or actual *strike or lock-out* affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several

States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved. . ."

61 Stat. 155, 29 U.S.C. §178(a) [in pertinent part]:

"Upon receiving a report from a board of inquiry, the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such *strike or lock-out* or the continuing thereof, and if the court finds that such threatened or actual *strike or lock-out* - - -

"(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in production of goods for commerce; and

"(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such *strike or lock-out* or the continuing thereof, and to make such other orders as may be appropriate."

cf. also: *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87, 92 and footnote 16.

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IN THE

Supreme Court of the United States

October Term, 1965

NEWSPAPER DRIVERS & HANDLERS LOCAL UNION NO. 372, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, IND.,
Petitioner

-vs-

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE EVENING NEWS ASSOCIATION, Owner and Publisher of the Detroit News, KNIGHT NEWSPAPERS, INC., Owner and Publisher of The Detroit Free Press, and NATIONAL LABOR RELATIONS BOARD,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' REPLY TO MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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Of Counsel for Respondent, Knight Newspapers, Inc.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' REPLY TO MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

A memorandum has now been filed (but not served on us)[1] on the Board's behalf urging summary vacation and remand so that it may reconsider this three year old case

[1]This memorandum, supporting in a limited way the petition for certiorari, was filed early in November as we are informed. Rules 24 and 33, as we understand them, required service on the undersigned as respondents' counsel. Our appearance had theretofore been entered by the Clerk. Notwithstanding, no such service was, or has been, made and we learned of the memorandum by chance when we filed the brief in opposition. As a member of the bar of the Supreme Court, counsel objects strenuously to this practice which has required the preparation and filing of this separate reply.

in the light of *American Ship Building* v. *Labor Board,* 380 U.S. 300, and *United Mine Workers* v. *Pennington,* 381 U.S. 657. The sole reason advanced for this indefinite postponement of a final decision herein is that the Board's expertise is a necessary prerequisite to judicial review. To grant such as a request would be not only a gross miscarriage of justice[2] but a relegation to the dust bin of the lower Court's careful review of the entire record in the light of the very arguments now advanced by the Board.

This case is, and was, ripe for judicial review. Not only were the facts disclosed by the extensive record largely undisputed but also the Court's supervening decisions in *American Ship Building, Pennington,* and *Labor Board* v. *Brown,* 380 U.S. 278, were fully considered by the Court below. A similar motion for remand, based on *American Ship Building,* was made weeks before the lower Court's decision. *Pennington* and its relevancy were fully considered on a petition for rehearing (Pet. App. D 86). Hence, this was not a case where the Board or the lower Court lacked the benefit of this Court's reasoning. The only question which the petition could conceivably raise is whether that reasoning was correctly applied. We believe it was for the reasons stated in our brief in opposition.

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[2]The incidents which gave rise to the complaint in this case occurred four or more years ago. Many of the principal witnesses are now deceased, retired and otherwise unavailable. Further, as the Court below observed (Pet. App. A, 16-17):

> "The Board had all the evidence before it concerning the layoff of the employees of the News, including the background of the newspaper situation in Detroit, the past records of the News and the Free Press in dealing with unions, the findings of the trial examiner and the arguments of counsel on the question at issue. The view now taken by the Supreme Court was argued to the Board and it chose not to follow it but to bottom its decision on its conclusion that any lockout, other than for the exceptions above mentioned, was illegal."

The memorandum's truncated statement of facts ignores and misstates the Board's own findings. Thus, it is flatly stated, without record reference, that there was no impasse prior to the lockout in this case (Mem. 5, fn. 4)[3]. Neither the examiner nor the Board so found, nor will the record support such a finding (Br. 6-8)[4]. It is similarly stated that the News locked out its employees in support of the Free Press bargaining position. This is diametrically opposed to the Board's own findings, confirmed by the lower Court (Br. 11-12). The true posture of the case may not be gleaned from the abbreviated statement in the memorandum. The governing facts have been fully stated with record references in our brief in opposition and need not be repeated here (Br. 4-12).

The decision which the Court is asked to review does not involve disputed questions of fact "but of a judgment as to the proper balance to be struck between conflicting interests", *Brown,* 380 U.S. at 292. As the Court there made clear, this is a proper subject for judicial determination. The Court below made such a determination and carefully considered and applied the pronouncements of this Court including the intervening decisions now cited by the Board.

In short, no matter how subtly phrased, the Board still seeks the "untrammeled authority to catalogue which economic devices shall be freighted with indicia of unlawful intent", *Brown,* 380 U.S. at 292, and the "general authority to define national labor policy by balancing the competing

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[3]Mem. 5, Fn. 4 refers to the memorandum for the National Labor Relations Board, the page number thereof and the footnote appearing on that page.

[4]Br. 6-8 refers to respondents' brief in opposition and the page numbers thereof.

interests of labor and management", *American Ship Building*, 380 U.S. at 318, in every case which does not precisely match the factual content of those cases.

This conclusion is inescapable when one considers that in this case the temporary layoffs were resorted to by the News in support of its legitimate bargaining position, under threat of strike and only after Mr. Hoffa's ultimatum terminating the bargaining had created an impasse. The lockout's sole purpose, as in *American Ship Building*, was to bring pressure to bear upon the Teamsters to modify their demands made upon the News. 380 U.S. at 312. Beyond this there is nothing except a positive record of 20 years of continuous bargaining with the Teamsters for contracts, all of which contained union shop clauses. There is not the slightest evidence of the type of intent or motivation which *American Ship Building* deemed essential to a Section 8(a)(1) and (3) violation. Unless the principles and policy there stated are to be abandoned, no legitimate grounds for review based on that case appear.

Pennington is even more remote. The memorandum distorts language from a minority opinion (381 U.S. at 665, 666) to buttress its claim that two employers bargaining with the same union in separate units may not support one another (Mem. 5). This was not even remotely involved in that case (Br. 17). But, more importantly, as has been demonstrated fully in our brief in opposition, the News finally resorted to the lockout in this case not in support of the Free Press but in support of *its own* bargaining position (Br. 11-12).

Considering the memorandum as a whole, there are no more fitting remarks than those of the Seventh Circuit when confronted with a similar request for remand (*American*

Brake Shoe Co. v. *National Labor Relations Board*, 244 F. 2d 489, 494, 495):

> " . . . If, as is advocated, this case were remanded to the Board for a redetermination of the §8 (d) issue, this action would merely give the Board another bite at the proverbial cherry, and, if such conduct were condoned, piecemeal litigation would result. Consequently, the request for remand is denied. . . . "

For the reasons herein stated, as well as in our brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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